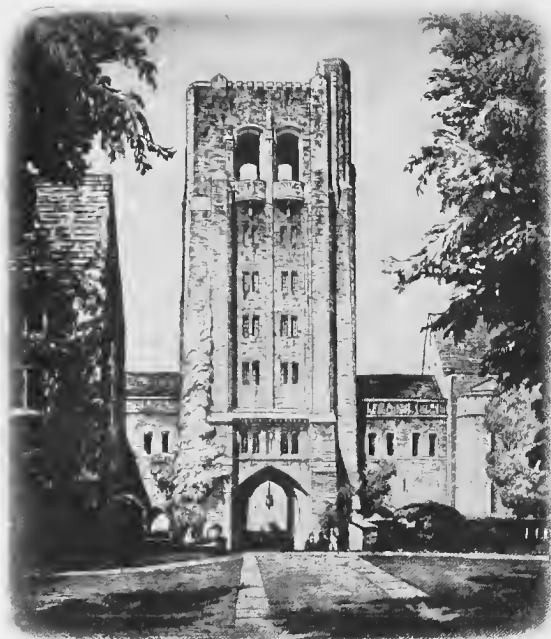


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A

TREATISE

ON

THE LAW OF WILLS,

EMBODYING

THE LATEST DECISIONS IN RELATION THERETO;

WITH

*An Appendix,*

CONTAINING

THE SUCCESSION DUTY ACT.

BY ARTHUR PARSONS,

(ST. JAMES'S STREET, NOTTINGHAM.)

ONE OF THE ATTORNEYS OF HER MAJESTY'S COURT OF QUEEN'S BENCH,  
ETC., ETC.

---

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# WILLS

## AND

## TESTAMENTARY DISPOSITIONS.

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### \*CHAPTER I.

#### OF WILLS AND TESTAMENTS GENERALLY.

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Definition of term Will.	Special Occupancy.
What 1 Vic., c. 26, repeals.	How general devise to be constructed.
Infants.	How Wills require executing.
Married Women.	Acknowledgment of Signature by Testator.
How power is well executed since 1 Vic., c. 26.	Construction of words foot or end thereof, and effect of 15 and 16 Vic., c. 24.
Collard v. Sampson.	Practice where no attesting clause.
Traitors and Felons.	Where attesting witnesses cannot be found.
Lunatics.	Publication.
Fear and Compulsion.	Who may be witnesses.
What persons may dispose of their Estates by Will.	
Copyholds, how devised.	

A WILL or testament is the legal declaration of a person's intentions, which he directs to be performed after his decease. The word will, however is more strictly applicable to an instrument for the disposition of a person's real estate, although it is synonymously used with the word testament, which is properly applicable to an instrument for the disposition of personal estate.

The passing of the 1 Vic., c. 26, made a great alteration in the law relating to wills, more especially as regards the formalities to be observed in their execution; and the cases that have been decided upon the construction or wording of the Act, tend to \*show that it is imperative to comply strictly with its provisions: the rigidity [\*2] of which, however, so far as relates to the position or part of the will where the testator was required to place his name, have been ameliorated by the 15 and 16 Vic., c. 24, which has a retrospective effect with regard to those wills already made, where administration or probate has not been already granted or ordered by a Court of competent jurisdiction.

It not unfrequently occurs that persons delay giving instructions for their wills until they are too seriously indisposed to be troubled with the suggestions of their legal advisers; thus it is that ill-matured testamentary dispositions are executed which lead to litigation and expense, besides causing endless dissatisfaction amongst the parties interested therein. It is well known that no document is more difficult to draw in a proper technical manner and clear of ambiguities than a will, the proof of which is evinced by their construction occupying so great a portion of the time of our judicial tribunals.

And it must be observed that *now* written instructions for a will is not a testamentary paper whereon probate can be obtained, although the testator die before there is time to prepare a regular will, unless such instructions are executed in the form prescribed by the Statute.

The 1 Vic., c. 26, has greatly simplified the law relating to wills, but it does not extend to wills made prior to the 1st of January, 1838, consequently the old law is still in force with regard to those made prior to that date—it repeals the 32 Henry VIII., c. 1; 34 & 35 Henry VIII., c. 5; 10 Car. I., s. 2, c. 2; (1) 29 Car., c. 3, s. 5, 6, 12, & 19 to 22; of the Statute of Frauds, 29, c. 2 & 3; 7 William III., c. 12; (1) s. 14 of 4 & 5 Ann, c. 16; 6 Anne, c. 10; (1) s. 9 of 14 Geo. II., c. 20; 25 Geo. II., c. 6, except so far as relates to Her Majesty's Colonies and Plantations in America; 25 Geo. II., c. 11; (1) and 55 Geo. III., c. 192.

As a general rule all person may make a will, but nevertheless there are certain persons precluded therefrom; or whose wills are inoperative [\*3] by virtue of some statute, or in consequence of \*their having dispossessed themselves of their former inherent power by some act of their own—of the former may be included infants, of which it is proposed shortly to refer to—of the latter may be considered traitors, &c., and women who have married without reserving any power, which they might have done.

Thus wills made by persons under twenty-one years of age are invalid, and such persons are declared incompetent to *make* a will by the 1 Vic., c. 26.

The law has thus fixed upon that age as being the proper time for a person to be empowered to dispose of his estates and chattels, however irreconcilable it may appear to be to the other prefixed periods whereby persons are made responsible for more serious acts, as in criminal cases, where it hath been held and is established as law that some persons may have as much cunning at the age of nine years as others have at fifteen, and they are just as amenable to the laws of the country accordingly.

Married women, as regards their ability to make a will, are left expressly to the operation of the old law.

The Queen Consort may dispose of her chattels as if she were a *feme sole*,<sup>(a)</sup> but *primâ facie* a married woman has no title to make a will, and if she claims a right she must show her title, because such right is contrary to the general tenor of the law;<sup>(b)</sup> but a title or right for a

(a) 2 B. C. 498.

(b) Temple v. Walker; 3 Phill., 403

married woman to make a will may be reserved to her by a settlement or otherwise, as executrix of another, and in such cases she is empowered to make a Will without the consent of her husband.(c)

All wills executed in pursuance of a power require to be executed in conformity with the 1 Vic., c. 26—and this must be observed although it may not be in the form required by the donor of the power—thus the additional or other form of execution or solemnity required by the creator of the power will be inoperative.

A testament made during coverture is void, though the wife outlive the husband, but not if she confirm the same after her \*husband's [ \*4 ] decease—which should be by a re-execution according to the Wills Act; and the will of a married woman, made when a *feme sole*, does *per se* revive on the death of her husband.(d)

It appears that a wife whose husband is banished by Act of Parliament may make a will, and in everything act as a *feme sole* as if the husband were dead,(e) and the legatees under a *feme sole's* will whose husband was banished were decreed their legacies.

#### HOW A POWER IS WELL EXECUTED.

A power required to be executed by any writing under the hand and seal of the donee, is, since the 1 Vic., c. 26, well executed by a will executed and attested in accordance with its provisions, although it is not under the seal of the donee.

The case of *Collard v. Sampson*(f) appears to clear up any doubts that before remained on this point. In that case certain estates were assigned to trustees, upon such trusts as the settler should, during his life, by any writing under his hand and *seal*, direct or appoint, and in default of and subject to such direction or appointment upon the trusts therein mentioned. The settler, by his will, made after the passing of the 7 Wm. IV. and 1 Vic., c. 26, duly executed and attested in accordance with the statute (*but not under seal*), and expressed to be in execution of the power contained in the said settlement, appointed the estates in manner therein mentioned. The question for the consideration of the court was, whether such an execution of the power was since the 1 Vic., c. 26, good and valid.

Sir J. Romilly, M. R., in his judgment referring to the case of *Buckell v. Blenkhorn*, 5 Hare, 131, observed, “that probably, since that case had been decided, many titles may have been settled on its authority, and that in the case then before him the will was made since that decision, and the testator might have thought that it would be a good execution of the power without seal,” and held that the will was a good execution of the power.

#### \*TRAITORS AND FELONS.

[ \*5 ]

Traitors and felons, from the time of their conviction and attainder or

(c) *Steadman v. Powell*; 1 Add. 60. *Bransby v. Haynes*; 1 Lee, 120.

(d) *Long v. Aldred*; 3 Add., 51. (e) *Trinit. T.*, 1689; 2 Vern, 104. (f) 17 Jur. 569.

outlawry, are also excluded from making a will, their property being no longer at their disposal, but altogether forfeited; and the property of the felon vests in the Crown, notwithstanding a conditional free pardon. Thus, where a convict sentenced to death for felony, but which was afterwards commuted for transportation for life, received a conditional free pardon in the penal colony, it was decided that such pardon did not alter the effect of the attainder in vesting the property in the Crown.<sup>(g)</sup>

#### PERSONS OF UNSOUND MEMORY.

A person of unsound memory cannot make a will of lands or tenements, or indeed any testamentary disposition of his property or effects.

Persons that are actually mad, and lunatics during the time of their insanity, are also incapacitated from disposing of anything by will because they cannot understand what they do, for in making a testament it is the perfectness of the mind that is the essential requisite; therefore, if the testator make his testament during his insanity, and he afterwards becomes sane, nevertheless the testament made when insane doth not become valid by reason of his recovering his understanding. On the other hand, a will made during a lucid interval is good, and his subsequent insanity does not affect it.

Every person is presumed to be of sound mind or memory unless the contrary be proved; therefore, the party seeking to impeach the validity of the will, must prove the impediment.

Consequently, if a lunatic, or one that is insane only at intervals, makes a will, and it is not known whether the same was made whilst he was of sound mind or not, if it is so framed that there is nothing evincing that it was made during a period of the testator's insanity, it must be presumed to be made whilst in a calm state of mind, and will be held good accordingly.

[\*6] \*There is a great distinction between such as are idiots and those that are lunatics only—the former are those that never had a glimmering of reason, or have entirely lost it by disease, grief, or other cause—whereas the latter are not at all times entirely bereft of reason and understanding, but only at periods, however prolonged those periods may be. Thus, in the one case, it is only natural that the law should look upon the person as totally incapable of comprehending the nature of a will, and therefore those wills professed to be made by them as void; whilst on the other hand it not only allows the person to make a will when not labouring under delusion, but liberally construes the disposition to be valid unless there is anything apparent on the face of it which shows a patent defect in the mind of the maker thereof, or it was known to be made by the person during a period of his insanity.

There are certain principles laid down in the cases that have been decided in testing the validity of testamentary dispositions<sup>(h)</sup>—thus, where in a case it was alleged that the testator had been if not from the date of his birth, yet at least from a period commencing shortly after, of

(g) *Re Church's Will*; 16 Jur., 517.

(h) *Frere v. Peacock*; 1 Robt., 44.

unsound mind, and that he continued so through life. Sir H. J. Fust observed, that in addition to the cases cited in the arguments, and which had been decided in the ecclesiastical and other courts upon recognized principles, medical writers had been referred to who had, of late years, since the commencement of the present century, in very learned treatises, introduced a new doctrine on the subject of insanity. By them insanity is now considered to be twofold, *moral* and *intellectual*. In the former the intellect may remain undisturbed, free from delusion; whereas in the latter the brain is disordered and the intellectual faculties impaired, although sometimes after death the brain does not betray disease. In the case of *Dew v. Clark*, Sir John Nichol stated his opinion, founded on his own observation as well as that of medical writers of repute in his day, and guided by what had occurred in this and other courts, that the true criterion is, where there is delusion there is insanity. Or, \*in other words, it is only a belief of facts which no rational person would believe, that is insane delusion; or, as Lord Erskine [\*7] has said, *delusion*; therefore, where there is no phrenzy or raving madness, *is the true character of insanity*. I am not aware that this test has ever been varied or departed from in these courts. Dr. Pritchard, in treating on the different forms of insanity, in relation to jurisprudence, himself admits this doctrine:—"It seems, on the whole, to be a settled doctrine of English courts at present, that there cannot be insanity without delusion, or, as it is otherwise expressed, illusion or hallucination; that is, without some particular erroneous conviction impressed upon the understanding—the affected person being otherwise in possession of the full and undisturbed use of his mental faculties."

The courts, it would appear, in recognizing the principle that a will made by a lunatic must be considered as valid unless it can be shown to have been made during a fit of insanity, are guided by the peculiarities of each case—for where a testatrix had been found a lunatic under a commission ten months before she made her will, it was held to be a valid instrument, her capacity at the time of her making it having been sufficiently established by the evidence; (i) but on the other hand, where actual insanity is *proved* to have once shown itself, either perfect recovery or at least a lucid interval at the time of the making of it must be clearly proved, to entitle the will to be pronounced for. (k)

Old age alone doth not preclude a person from making a will, but it is otherwise when old age has so impaired the faculties of the mind that it evidences symptoms of childishness, for then it must be looked upon as a mild species of insanity which time alone may have caused.

It hath also been considered that a person deaf and dumb cannot make any kind of testament, nevertheless there appears no reason that deaf and dumb persons should be excluded from this privilege, especially if they are otherwise of sound mind; and there can be no doubt that the will of a deaf and dumb person written by himself would be valid, or even if made by a \*third party, and it could be proved that [\*8] he perfectly comprehended the contents thereof.

(i) *Rodd v. Lewis*; 2 Lee, 177.

(k) *Ayrey v. Hill*; 2 Add., 209.

## FELO-DE-SE.

If a man wittingly and willingly kill himself, his testament is void both as regards the appointment of any executor and as to any legacy of his goods or personalty, for they are forfeited to the Crown.

A joint tenant of land cannot make a will of his part, for upon his death his share goes to the survivor.

## FEAR AND COMPULSION.

There is another cause that will preclude validity attaching to a will under certain circumstances, namely, when a person makes a will under compulsion or fear, for in both cases it would be anything but the voluntary intention of the testator, which is the very essence of a will; but a will made under such circumstances, being afterwards confirmed by a voluntary re-execution in compliance with the statute would be valid, and wills obtained by importunity and fraud are also void.

## WHO MAY DISPOSE OF HIS ESTATE BY WILL.

With the exceptions above mentioned, it is now lawful for any person to dispose of his real and personal estate by will, whether he shall be entitled to the same at law or in equity at the time of his death, and which if not so disposed of would devolve upon the heir-at-law or customary heir of him, or if he became entitled by descent of his ancestor or upon his executor or administrator; and the power of disposition extends to all real estates of the nature of customary freehold or tenant-right, or customary or copyhold, notwithstanding the testator may not have surrendered the same to the use of his will, or notwithstanding that being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of [ \*9 ] a will, or otherwise could not \*at law have been disposed of by will, if the 1 Vic., c. 26 had not been passed, or notwithstanding that the same in consequence of there being a custom, that a will or a surrender to the use of a will should continue in force for a limited time only or any other special custom, could not have been disposed of by will according to the power contained in the last-mentioned act—if the act had not been made—and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant-right, customary or copyhold or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament, and also to all contingent executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same may become vested, and whether he may be entitled thereto under the instrument by which the same were created, or under any disposition thereof by deed or will—and also to all rights of entry for conditions broken and other rights of entry, and also to such of the

same estates, interests and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of the will.

So that a will executed after the 1st of January, 1838, takes effect from the death of the testator, and will pass property acquired after the date of the will, and copyhold land is devisable in the same manner as freehold.

Where any real estate, of the nature of customary freehold or tenant-right, or customary or copyhold, might, by custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator has not surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties as would have been due in respect of the surrendering of such real estate to the use of the will—or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered \*to the use of the will of such testator, and where the testator was entitled to have been admitted to such real estate, and might, [\*10] if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate, in consequence of such will, shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties and fees as would have been due in respect of the admittance of such testator to such real estate, and also of all such stamp duties and fees as would have been lawfully due in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate and afterwards surrendered the same to the use of his will; all which stamp duties and fees are to be paid in addition to the stamp duties and fees, fine or sums of money payable on the admittance of such person so entitled, or claiming to be entitled to the same real estate as aforesaid.

Where any real estate, of the nature of customary freehold or tenant-right, or copyhold, is disposed of by will, so much thereof as relates to the disposition of the estate shall be entered on the court rolls of the manor—and when any trusts are declared by the will, it is not necessary to enter the declaration of such trusts, but to state in the entry in the court rolls that such real estate is subject to the trusts declared by such will.(l) And in those cases where real estate could not have been disposed of by will, the same fine is to be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate—and the lord has the same remedy for recovering such fine, heriot and services, as he is entitled to for recovering the same from the customary heir in case of a descent.(m)

If no disposition by will is made of any estate *pur autre vie* of a freehold nature, the same is chargeable in the hauds of the heir as if it

(l) 1 Vic., c. 26, s. 5.

(m) Ibid.

shall come to him by reason of special occupancy, as assets by descent, as in case of freehold land in fee simple.

[\*11] \*Special occupancy, be it observed, is where an estate is granted to a man and his heirs during the life of *cestui que vie*, and the grantee die without alienation, and while the life for which he held continues, the heir will succeed and is called in law the special occupant.

In those cases where there is no special occupant of any estate *pur autre vie*, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator, either by reason of a special occupancy or otherwise, it shall be assets in his hands, and must be applied in the same manner as the personal estate of the testator or intestate.

A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.(n)

And where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.(o)

But copyholds will not pass under a devise "of all my freehold hereditaments and estates in S.," though the freeholds and copyholds were to some extent intermixed and usually let together.(p)

[\*12] \*Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold shall thereby be given to him expressly by implication.(q)

And where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust

(n) 1 Vic., c. 26, s. 27.

(o) Sec. 28.

(p) Quennel v. Turner; 13 Beav.

(q) 1 Vic., c. 26, s. 31.

may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

#### HOW WILLS REQUIRE TO BE EXECUTED AND ATTESTED.

All wills (with the exception of soldiers in actual service and seamen at sea) must be in writing, and signed at the foot or end thereof by the testator or some other person in his presence and by his direction; and such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator, but no form of attestation is necessary.

The statute does not say that the name of the *testator* shall appear at the foot of the will, and therefore, where a will was executed by the mark of the deceased, although her name did not appear on the face of the instrument it was determined that this was sufficient, there being affidavits to account for the will having been signed in that manner.<sup>(r)</sup>

\*And where the testator signed his name immediately below the attestation clause, which was written close to the end of the [\*13] will, it was determined to have been duly signed at the foot or end thereof;<sup>(s)</sup> but it having been found that in construing the words "foot or end" thereof strictly, many hardships were likely to arise by the defective execution of wills, it was deemed advisable to introduce the 15 & 16 Vic., c. 24, whereby after reciting the 9th section of the Wills Act, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; enacts that every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him, as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow, or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after or under, or beside the names, or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page, or other portion of the paper or papers containing the will, whereon no clause, or paragraph, or disposing part of the will shall be written above the signature, or by the circum-

(r) In re goods of E. Bryce; 2 Curt., 325.

(s) In re Harris; 13 Jur., 285.

stance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written, to contain the signature; and the enumeration [ \*14 ] of the above circumstances shall \*not restrict the generality of the above enactment; but no signature under the said act, or this act, shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction, in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will.

The first case decided under the provisions of the above was in the goods of Mary Brown, 16 Jur., 602—in which the deceased left a will in her own handwriting, dated May, 1850, and written on six pages of letter paper, concluding nearly at the end of the sixth page, where, as well as at the bottom of each preceding page, she had written her name, but there not being room on the sixth page for an attestation clause, that clause was written on the top of the seventh page, and the testatrix again wrote her name there—the signature on the sixth side was made before the execution, but that on the seventh side was the only one made in the presence of or seen by the attesting and subscribing witnesses—motion for probate was rejected on 4th Dec., 1851—it was, however, determined to come within the meaning of the 15 & 16 Vic., c. 24, and probate was accordingly decreed. (t)

The signature to a will must be made or acknowledged by the testator [ \*15 ] in the presence of two or more witnesses present at the \*same time, and such witnesses shall attest and subscribe the will in the presence of the testator. (u)

There are cases which show that an acknowledgment of the signature have been considered as a sufficient attestation under peculiar circumstances—thus it has been held sufficient where a will was signed in the presence of one witness only, but the signature afterwards acknowledged in the presence of three attesting witnesses. (v)

The acknowledgment may be expressed in any words which will adequately convey the idea; (w) if the signature be proved to be then existent, no particular form of expression is required either by the word “acknowledge” or by the exigency of the act to be done. It would be quite suf-

(t) It thus appears, the mere rejection of a motion for probate does not amount to a decree against the paper, which might be pronounced and propounded for afterwards.

(u) 1 Vic., c. 26, s. 9.

(v) Re C. Regan; 1 Curt. 909.

(w) Hudson v. Parker; 1 Robert, 25.

ficient to say "That is my Will"—the signature being there and seen at the time—for such words do import an owning thereof; indeed it may be done by any other words which naturally include within their true meaning, acknowledgment and approbation.

The Court, in construing whether the acknowledgment of the signature is sufficient, is governed in a great measure by the conduct of the deceased and the circumstances of the case—for where the court is satisfied, from the conduct of the deceased and the circumstances of the case that the signature was written previous to the witnesses signing their names, the deceased having read aloud the words "This is the last Will and Testament of me, C. B.," and having himself produced the will and told the witnesses that it was all in his own hand-writing, the whole transaction being in the most open manner the will was pronounced for, and the party opposing it not allowed costs.(x)

So the statute does not require the testator to sign the will, it requires it to be signed by the testator or by some other person in his presence and by his direction; and where some other person signs a will for a testator, the signature should be preceded by the words "Signed on behalf of the testator, in his presence and by his direction;" and such signature being made \*by one of the attesting witnesses, by the direction [ \*16] of the testator and in his presence and that of the other attesting witness, was determined valid and not repugnant to anything contained in the 1 Vic., c. 26.(y)

#### INTERPRETATION OF THE WORDS FOOT OR END THEREOF.

The words at "the foot or end thereof" are to be construed strictly and previously to the Wills Amendment Act—where the will terminated within an inch of the bottom of the third page, but the signature was on the fourth page, it was determined that the will was invalid, although the testatrix, at the time of the execution, explained to the witnesses why she so signed(z)—but it was held to be a good execution where the attestation clause was written close to the end of the will and across the paper, and the testatrix signed her name on the same side but at some distance below the attestation clause(a)—but where the deceased was blind, and had signed her name some distance down the third side of a sheet of paper, the will itself being written on the first two sides, the court considered it under the circumstances, a compliance with the words signing at the foot or end.(b)

The witnesses must actually subscribe their names as witnesses to the will, and also actually subscribe their names on the re-execution thereof, for the mere tracing the name over with a dry pen is not a subscribing within the act, but is a mere acknowledgment by the witness, and an insufficient attestation;(c) but where a will made after the 7 Wm. IV.

(x) In re J. Attridge; 12 Law Times, 381.

(y) Re J. Bailey; 1 Curt., 915.

(z) Smee v. Bryer; 13 Jur., 289 P. C.

(a) In re Beadle; 13 Jur., 478 P. C.

(b) In re Helling; 13 Jur., 568 P. C.

(c) Playne v. Scriven; 13 Jur., 712 P. C.

and 1 Vic., c. 26, came into operation, was attested by one witness in his own hand-writing, and he also held and guided the hand of the second witness who could not write or read; and in this way the second witness's name was written as attesting witness—the testator having desired the two to attest it, was held a sufficient attestation.(d)

[\*17] \*The witnesses must subscribe their names in the presence of the testator and in each other's presence, and by the direction of the testator: which direction, it is presumed, may be considered complied with if the will is strictly otherwise executed according to the statute, although the testator does not expressly desire the witnesses to attest his will if that intention can be collected from his conduct, and they do attest accordingly. It is advisable, however, in all cases, for the testator to expressly request the witnesses to subscribe their names as witnesses.

The paper writing purporting to be the will of a person, must be duly executed as the will of such person—thus, where verbal instructions for a will were obtained from F. T., who was dying, by the personal suggestion and importunity of M. T., who directly afterwards wrote out the will and procured its execution, F. T. never spoke after the execution, but the evidence proved a certain degree of capacity at the time of execution. M. T. and her near relatives took a large benefit under the will, and it was attested in the same room in which the deceased was. M. T. deposed that the deceased could see the witnesses sign their names, the witnesses deposed that she could not. It was held that the paper for which instructions had been obtained was not entitled to probate, and that the balance of evidence showed that it was not duly executed as a will.(e)

Although no form of attestation is necessary, it is always advisable to insert a proper clause embodying such words as show that the will was executed by the testator in the presence of the persons who subscribed their names as witnesses, and that such persons were present at the same time, and that they subscribed their names as witnesses at the request of the testator and in his presence.

And where there is not a full attestation clause, the court requires an affidavit from both of the attesting witnesses, to the effect that the requisites of the statute have been complied with.(f)

[\*18] \*The attesting witnesses must both be present, as well as the testator, when they subscribe; and where a will signed in the presence of one witness, who thereupon subscribed his name as such, but some hours afterwards another witness was introduced, when the testator, in the presence of both witnesses acknowledged his signature, and the second witness signed his name, and the first witness acknowledged his signature previously made, it was not deemed to be a due execution with the 9 sec. of 1 Vic. c. 26.(g)

Where the attesting witnesses are required and cannot be found, the court will grant a probate where it is shown that means have been taken

(d) *Harrison v. Elvin*, 3 A. and Ellis, 117.

(e) *Tribe v. Tribe*; 13 Jur. 793 P. C.

(f) *Re G. Thompson*, 1 Notes of Cases, 211; and see *Waddilove*, E. L. 345.

(g) *Casement v. Fulton*; 5 Moore, P. C. C. 140.

to find them, as by advertisement or otherwise; thus a will, signed by the deceased with merely the words "signed in my presence," under which were the names of two witnesses, was admitted to probate without an affidavit as to the due execution; neither of the witnesses being to be found, although means had been taken to discover them by advertisement.<sup>(h)</sup>

A will will be pronounced for where the attesting witnesses differ as to whether the testator sign in their presence, where it can be gathered from their evidence that the testator acknowledged his signature in their joint presence.<sup>(i)</sup>

#### AS TO THE PUBLICATION OF A WILL.

Every will executed according to the provisions of the 1 Vic., c. 26, is valid without any further publication thereof; and if any person who shall attest the execution of a will, shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, the will will not be invalid on that account.

And any person attesting the execution of a will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment (except directions for payment of debts) shall be given or made, such devise, legacy, estate, gift or \*appointment, is, so far [\*19] as concerns such persons attesting the execution, or the wife or husband of such person, or any person claiming under such person, or wife, or husband, utterly void, and the person so attesting is to be admitted as a witness to prove the execution of the will or the validity thereof, notwithstanding such devise, gift, or appointment.

Thus the attesting witness to a will is deprived of taking any legacy or beneficial interest under the will—it must be a strictly beneficial interest that he takes under the will to come within the meaning of the above section; and it has been held<sup>(k)</sup> that the universal legatee in trust was not barred from taking administration with the will annexed, since the interest he took was merely of an equitable nature.

It thus appears that any person of sound mind may be a good witness to a will; and a will, once duly executed and attested in compliance with the statute, will not be invalid in consequence of anything subsequently done in error and by mistake.<sup>(l)</sup>

A creditor is specially mentioned to be a good witness, and it has been held that a felon is not precluded.

Executors of a will are also admissible to prove the execution thereof on a suit instituted as to its validity.

(h) In re M. E. Luffenun; 5 Notes of Cases, 183 P. C.

(i) Cooper v. Bocketi; 4 Moore, P. C. C. 419.

(k) In re J. Ryder; 2 Notes of Cases, 462 P. C.

(l) Re Hannam; 14 Jur., 558, P. C.

[\*20]

## CHAPTER II.\*

## WILLS OF SEAMEN AND SOLDIERS, NUNCUPATIVE WILLS, AND WILLS OF FOREIGNERS.

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How Soldiers and Seamen may dispose of their personal estate.	Term "Mariner and Seaman."
Statutes relating thereto.	Foreigner.
Nuncupative Will, when valid.	Will of Foreigner made in a foreign country, disposing of property here.
Informal Codicil by Seaman.	Domicile.
Will of Minor, a Soldier in East India Company's Service.	How proved.
	Children's Domicile.

THE old law, that is, the law as it existed prior to the 1 Vic., c. 26, is still in operation with regard to the wills of soldiers in actual military service and seamen at sea, and such persons may dispose of their personal property accordingly. The old law, however, was regulated by several enactments,<sup>(a)</sup> which also consolidates the laws relating to the pay of the royal navy: by which no will made by any petty officer, or seaman, or non-commissioned officer of marines, before his entry into his majesty's service, is valid to pass any wages or other moneys payable in respect of service in the navy, nor is any letter of attorney made by any such person, who shall be or shall have been in the said service, or by the widow, next of kin, executors or administrators of any such person, valid or sufficient to entitle any person to receive any such wages or other moneys, unless such letter of attorney is therein expressed to be revocable.

To validate any will or letter of attorney made or to be made by any petty officer or seaman, non-commissioned officer of marines, who is or has been in the naval service, it must contain the name of the ship to which the person executing such will belonged at the time, or to which he last belonged; and such \*letter must also, if made by an executor or administrator, contain the name of the ship to which his or her testator or intestate last belonged, and also, in every case, a full description of the degree of relationship or residence of the person or persons to whom or in whose favour, either as attorney or attorneys, executor or executors, the same shall be made, and also the day of the month and year, and the name of the place when and where the same shall have been executed.

## HOW SUCH PETTY OFFICER OR SEAMAN'S WILL IS TO BE EXECUTED.

The will or letter of attorney, to be valid, requires to be executed and attested in manner following, viz.: in case any such letter of attorney, or will, shall be made by any petty officer, or seaman, or non-commissioned officer of marines, while belonging to and on board of any of his majesty's ships, as part of her complement, or borne on the books thereof

(a) 11 Geo. IV., and 1 Wm. IV., c. 20, s. 48.

as a supernumerary, or as an invalid, or for victuals only, the same must be executed in the presence of the captain, who must also attest the same, (or in his absence) by the commanding officer for the time being; and who, in that case, must state, at the foot of the attestation, the absence of the captain at the time and the occasion thereof; and in case of the inability of the captain, by reason of wounds or sickness, to attest any such will or letter of attorney, then the same must be executed in the presence of and attested by the officer next in command, who must state at the foot of such attestation the inability of the captain to attest the same, and the cause thereof; and if made in any hospital ship, or naval or other hospital, or at any sick quarters either at home or abroad, the same must be executed in the presence of and attested by the governor, physician, surgeon, assistant surgeon, agent, or chaplain of any such hospital, or by the commanding officer, agent, physician, surgeon, assistant surgeon, chaplain, or chief officer for the time being of any such hospital ship, or by the like officers of any military or merchant hospital or sick quarters.

\*And where any such will or letter of attorney is made on board of any vessel in the transport service, or in any other [ \*22 ] merchant ship or vessel, the same is to be executed in the presence of and attested by some commission or warrant officer or chaplain in the navy, or some commission officer or chaplain to the land forces or royal marines, or the governor, physician, surgeon, or agent of any hospital in the navy or military service, if any such shall be then on board, or by the master or first mate thereof, and if made after he shall have been discharged from the service; or if such letter of attorney be made by the executor or administrator of any such petty officer or seaman, non-commissioned officer of marines, if the party making the same shall then reside in London, or within the bills of mortality, the same must be executed in the presence of and attested by the inspector for the time being of seamen's wills and powers of attorney, or his assistant or clerk; and if the party making the same shall then reside at or within the distance of seven miles from any port or place where the wages of seamen in his majesty's service are paid, the same shall be executed in the presence of and attested by one of the clerks of the treasurer of the navy resident at such port or place; or if the party making such letter of attorney, or will, resides at any other place in Great Britain or Ireland, or in the islands of Guernsey, Jersey, Alderney, Sark, or Man, the same must be executed in the presence of and attested by a justice of the peace, or by the minister or curate of the parish or place in which the same shall be executed; or if the party making the same shall then reside in any other part of his majesty's dominions, or in any colony, plantation, settlement, fort, factory, or any other foreign possession of the Crown, or any settlement within the charter of the East India Company, the same is to be executed in the presence of and attested by some commission or warrant officer, or chaplain of the navy, or commission officer of royal marines, or the commissioner of the navy, or naval store-keeper at one of the naval yards, or a minister of the Church of England or Scotland, or a magistrate or principal officer residing in any of such

[ \*23 ] places \*respectively ; and where the party making the same shall then reside at any place not within his majesty's dominions, or any of the places last mentioned, the same are to be executed in the presence of and attested by the British consul or vice consul, or some officer having a public appointment or commission, civil, naval, or military, under government, or by a magistrate or notary public of or near the place where such letter of attorney or will is executed ; nor is any will of any petty officer, seaman, non-commissioned officer of marines or marine, good or valid in law to any intent or purpose which shall be contained in the same instrument with a power of attorney.

#### WHERE THE CAPTAIN'S SIGNATURE HATH BEEN OMITTED IN THE ATTESTATION.

If it appears, to the satisfaction of the Treasurer of the Navy, that in the attestation clause of any will or letter of attorney, the captain's signature hath been omitted by accident or inadvertence, but that in other respects the execution is conformable to the provisions and meaning of the act, he is empowered to pass the same as sufficient.

#### EXCEPTION AS TO WILLS MADE BY PRISONERS OF WAR.

Every letter of attorney or will which shall be made by any petty officer or seaman, or non-commissioned officer of marines, while any such person is a prisoner of war, will be valid to all intents and purposes, provided it is executed in the presence of and attested by some commissioner, officer of the army, navy, or royal marines, or by some warrant officer of the navy, or by a physician, surgeon, or assistant surgeon in the army or navy, agent to some naval hospital, or chaplain of the army or navy, or by some notary public, but so as not to invalidate any payment which hath been already made under any letter of administration, certificate or otherwise, in consequence of the rejection of any such wills by the inspector of seamen's wills, for want of the due attestation thereof according to the directions of any former act of Parliament.

#### [ \*24 ] \*DIRECTIONS TO OFFICERS COMMANDING SHIPS.

The officers commanding ships must distinguish, upon their monthly muster books, which of the persons therein named have made any letter of attorney or will during that month, or other space of time from the preceding return, by inserting the date of such letter of attorney or will opposite the parties' name, under the heading of "Letters of Attorney or Wills," or both, as the case may be or require ; and they must likewise transmit to the treasurer of the navy office, a list of all such persons.

#### REQUIREMENTS BEFORE ACTING ON SEAMAN'S WILL.

Before any letter of attorney or will is attempted to be acted upon, the same must be sent to the treasurer of the navy, at the navy pay

office, London, in order that it may be examined by the inspector of seamen's wills and letters of attorney, who will, on its receipt, register it, and take due means to ascertain its authenticity; and in case he doubts its authenticity, he will give notice in writing to the attorney or executor, as the case may be, that the same is stopped, and the reason thereof, and also report the same to the treasurer of the navy, and moreover enter his caveat against such letter of attorney or will, which will prevent any money from being received thereon until it is authenticated to the satisfaction of the treasurer; but if, upon examination, it is found there is no reason to doubt its authenticity, the inspector will sign his name thereto, and put a stamp thereon in token of his approbation—and as to such letters of attorney, forthwith send to the person therein named as attorney a cheque, specifying the number of the letter of attorney, the name and description of the person granting the same, also the name and description of the person in whose favour the same is granted, the date and place when and where executed, and the names of the witnesses attesting the same, which cheque will be a sufficient authority for the attorney to demand and receive payment of, and to give acquittances for, all such wages, pay, or \*other allowances of money to which the person granting the same was entitled; and no letter of attorney [\*25] of any petty officer or seaman, or non-commissioned officer of marines, which has not been executed on board the ship to which the party belonged, in the manner before prescribed, is to be allowed by the inspector until a certificate has been produced to him, signed by the captain, specifying the period the party has served on board, unless reasonable cause be shown to the inspector for dispensing with the same.

The treasurer of the navy is not bound to pay regard to any power of attorney, or cheque of any power, unless the same is actually produced at the time payment is claimed.

#### MODE BY WHICH EXECUTORS ARE TO OBTAIN PROBATE.

The will having been transmitted and registered, as before pointed out, the inspector causes to be issued to the person therein named as executor a cheque in lieu thereof, containing directions to return the same, with his signature thereto, upon the testator's death, to the treasurer of the navy—and in the event of the testator's death, the minister or curate of the parish in which the party named as executor shall then reside, shall, upon application of the executor, examine him and two such inhabitant householders of the parish as may be disposed to certify their personal knowledge of the holder of the cheque touching his claim, and that they are satisfied of his being the person therein described as executor; and the said executor is to subscribe his name to the application, and the two householders their names to the certificate for that purpose subjoined to the cheque (the blanks therein being first filled up agreeable to truth,) in the presence of the minister or curate, for which respective purposes the said executor and householders must attend at such time and place as the minister or curate appoints: who being, upon examination of the several parties, satisfied with their

answers, and that the person holding the cheque is the executor therein named, and that the persons certifying are inhabitant householders of [ \*26 ] the parish, and having seen the said \*parties sign the application and certificate, shall add a description of the person claiming as executor, and certify to the several particulars by subscribing his signature thereto—the executor must pay to the minister or curate a fee of two shillings and sixpence.

The application and certificate being completed, they require to be transmitted by the minister or curate by the post, addressed to the treasurer of the navy, *London*—and the original will having been passed, the inspector notes thereon the amount of wages due to the deceased, and then forwards the will to a proctor for him to obtain probate thereof—and in case the executor does not reside within the bills of mortality, the inspector will forward to the proctor a letter addressed to the minister, and the proctor having received the will and the letter of the inspector, will sue out the previous commission or requisition and take the proper steps to enable the executor to obtain probate, and will enclose in the said letter a copy of the will and the commission, with instructions for executing the same—and forward the same to the minister, by the general post, agreeably to the address put thereon by the inspector of seamen's wills.

#### MANNER OF OBTAINING ADMINISTRATION OF INTESTATE PETTY OFFICER OR SEAMAN'S EFFECTS.

The person claiming administration sends a letter to the inspector, stating his place of abode, the parish in which the same is situate, his degree of relationship to the deceased, the name of the deceased, and the ship to which he belonged—that he has been informed of the intestate's death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased's effects; upon receipt of this letter the inspector sends by post to the minister of the parish wherein the claimant resides a petition, together with the requisite certificates, and pointing out the steps to be taken therein, in like [ \*27 ] manner as has been before observed with regard to executors obtaining probate. (See ante.) The minister or \*curate may reject any petition for want of satisfactory proof or claim.

And every minister to whom such letter with a commission is transmitted, must immediately take the necessary steps for procuring the execution of the same, and transmit the same to the Treasurer of the Navy, London; and upon receipt of the commission at the Navy Pay-office the same is to be forwarded to the Proctor, who will forthwith procure the requisite probate or letters of administration, and transmit the same to the Inspector at the Navy Pay-office.

When these have been obtained, and the proctor employed therein has forwarded them to the Treasurer of the Navy, with a copy of the will (in case of probate) and an account of his charges, the inspector will issue a cheque in the manner prescribed; and as soon as the wages and the amount of the prize money is noted on the cheque, and after abating the

proctor's charges, the balance will be paid to the party personally, and the cheque delivered to the party to stand instead of the probate or letters of administration, and enable him to receive whatever other sums may become payable to the deceased's estate.

#### NUNCUPATIVE WILL.

A nuncupative will is an oral testament, declared by a testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing.

The 29 Car. II., c. 3, restricted nuncupative wills, except when made by mariners at sea and soldiers in actual service; it moreover enacts that no written will shall be revoked or altered by a subsequent nuncupative one, except the same shall be, in the lifetime of the testator, reduced to writing and read over to him and approved, and unless the same be proved to have been so done by the oaths of three witnesses at the least, who by 4 & 5 Anne, c. 16, must be such as are admissible upon trials at common law.

No nuncupative will shall in anywise be good where the estate bequeathed exceeds £30, unless proved by three such witnesses [\*28] \*present at the making thereof, and unless they or some of them were specially required to bear witness thereto by the testator himself, and unless it was made in his last sickness, in his own habitation or dwelling house, or where he had been previously resident ten days at least, except he be surprised with sickness on a journey or from home, and dies without returning to his dwelling.

No nuncupative will shall be proved by the witnesses after six months from the making unless it were put in writing within six days, nor shall it be proved till fourteen days after the death of the testator, nor till process has first issued to call in the widow or next of kin to contest it, if they think proper.

#### INFORMAL WILLS, UNDER PECULIAR CIRCUMSTANCES.

An informal Codicil made by a seamen engaged with the enemy on board ship, but in a river beyond the flux and reflux of the tide, is valid under the 1 Vic., c. 26, s. 11.(b)

So where a *minor* in the military service of the East India Company, being mortally wounded in action, wrote a will in pencil, which was attested but by one witness, it was held to come within the exception of the Statute of Frauds, and was treated as a will.(c)

And where a surgeon in the same company's service returned from this country to join his regiment in India, in medical charge of recruits, and in July, 1838, when on board ship at Portsmouth, he wrote a paper of a testamentary nature, but appointing no executor or residuary legatee and which was moreover unattested, it was determined that administration with the paper annexed, passed to the mother of the deceased.(d)

(b) Re Austen, 17 Jur., 284.

(c) In re S. Farquhar, P. C., 4 July, 1846.

(d) In re H. D. Donaldson, 2 Curt., 386.

## TERMS MARINER OR SEAMAN.

It appears that the terms "mariner or seaman" do not exclude any person in Her Majesty's Navy from the benefit of the exception [ \*29 ] \*of the 11th sec. of 1 Vic., c. 26, although superior officers "at sea"—thus, an unattested Codicil, dated 18th January, 1838, to a will duly executed, dated April, 1833, made at sea by the purser of a man-of-war, has been admitted to probate.<sup>(e)</sup>

## FOREIGNER DOMICILED IN ENGLAND.

A foreigner domiciled in England may, of course, make a will or testamentary disposition of his personal property, and the distribution of his personal property in England will be subject to the same laws as any other natural-born subject, and when naturalized he may also devise his real estate here, and his will will be construed according to the law of England in all respects as an Englishman's—but a will made in a foreign country, disposing of personal property in this country, must be proved here, notwithstanding it is also proved there; and the practice is to transmit an exemplified or authenticated copy here, which is proved in the Ecclesiastical Court and lodged in the registry as if it were an original will. As to the authentication of the copy, see *Raymond v. De Watteville*; 2 Lcc, 358.

"That place is properly (says Mr. Justice Storer) the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom." This definition of the learned Judge is open to explanation; for "the present intention of a person's removing" cannot possibly be known but by that person himself, and where a definition of a word or a rule of law is to be expounded on such a frailty, it argueth of its unsoundness.

The mode of ascertaining the domicile of a person may be collected from the cases decided on that question—thus, it being *prima facie* evidence only that where a person resides there he is domiciled, it is necessary when the question of legal domicile is raised to see what was the domicile of origin, that being ascertained it prevails till the party shall have acquired another, with an intention of abandoning the original domicile.<sup>(f)</sup> Secondly, the fact of residence must be accompanied by an intention of permanently residing in the new domicile and of abandoning [ \*30 ] the \*former; the change of domicile must be manifested *animo et facto* by the fact of residence and the intention to abandon—thirdly, that the domicile of origin having been abandoned and a new domicile acquired, that new domicile may in turn be abandoned and a third domicile acquired—fourthly, the presumption of law being that the domicile of origin subsists until a change of domicile is proved, the *onus* of proving the change is on the party alleging it; and this onus is not discharged by merely proving residence in another place, which is not in-

(e) In re Hayes, 2 Curt. 338.

(f) 5 Ver. Jur., 750.

consistent with an intention to return to the original domicil, but the change must be demonstrated by fact and intention.<sup>(g)</sup>

The domicil of the parent is that also of their children until the contrary is proved. Thus, if a person is born of parents who are British subjects, although he were born abroad he would be a British subject, and this whatever might be the domicil of his parents or himself.<sup>(h)</sup> So also the wife acquires the domicil of her husband, which continues after his death.<sup>(i)</sup> And the domicil of the husband is also that of the wife, although they may be living apart under a deed of separation.<sup>(k)</sup> And an Officer in the service of the East India Company, and residing in the East Indies, does not thereby acquire a domicil in that country,<sup>(l)</sup> but a man may obtain a new domicil in a country where he is only a lodger, and without repudiating his nationality; for where a testator was a native of Scotland, and domiciled there, and afterwards came to London, where he continued to reside chiefly in lodgings, for many years making London the central place of his affairs and business, it was determined that he acquired a new domicil in London.<sup>(m)</sup>

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### \*CHAPTER III.

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#### THE CONSTRUCTION OF WILLS GENERALLY.

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General rules applicable to the construction of wills.	Estate by Implication.
Extrinsic Evidence, when admissible to remove ambiguities.	Terms "Legal Representatives."
Parol Evidence, when admissible to explain ambiguities.	Doctrine of Cypress.
Meaning of "contrary intention," with reference to 24 sec. 1 Vic., c. 26.	Words "Die without issue," how construed.
	What words create a Trust in a will generally.
	Estates Tail.

To guard against a will being misconstrued, the intention of the testator should be set forth in clear and unambiguous legal phraseology, and where words are used that import or will bear a double meaning or construction, they should be followed by some explanatory phrase, clearly defining which construction is to be put upon them.

The names and description of the legatees should be definitely set forth and in describing sons and wives and other relations, where there is any doubt of their being legally such, they should be described as the reputed relations, and it is also always advisable to state that the personal estate of the testator shall be the primary fund for the payment of debts; and

(g) *De Bouneval v. De Bouneval*; 1 Curt., 863. *Munro v. Munro*; 7 Clark and Finn, 881. *Law Times* 9, Vol. 167. *Waddilove's Dig. Ecc. Law*, 169.

(h) *Maltus v. Maltus*; 1 Robt., 71.

(i) *Gout v. Zimmerman*; 5 Notes of Cases, 440. *Law T.*, 9—412.

(k) *Wad.*, E. D. 170. (l) *Atty. Gen., v. Napier*; 15 Jur., 253.

(m) 15 Jur., 567.

in creating life estates only, care should be taken not to give a greater estate in the premises.

A will cannot be too concise, providing the intention of the testator is fully expressed in the manner before observed, and the necessary clauses [ \*32 ] relating to the trusts(a) properly set forth ; \*for it not unfrequently occurs that unnecessary clauses in a will are found to qualify the whole instrument and interfere materially with its otherwise easy construction. The courts, in construing wills, endeavour to construe favourable, and as near the minds and apparent intentions of the parties as the rules of law will admit; for as Sir Edward Coke hath it, "*verba intentioni, non è contra, debent inservire*," and the courts have even considered the ignorance of testators as a sufficient cause for their establishing the doctrine of giving liberal constructions to wills, rather than of enshrouding them with the observance of technicalities which might render them inoperative ; thus we find the rule that "*Benignè faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat, quam pereat*," therefore the construction must be agreeable to common understanding, and the law will dispense with want of words in devises which are absolutely necessary in other written instruments. And in a recent case,(b) where the question arose whether the expression "worldly goods," made use of in a will, and taken in connection with the whole instrument, passed the testator's real estate, or was to be confined only to personalty, Sir William Page Wood, V. C., decided, that without violating the rules applicable to the construction of testamentary dispositions, and considering the whole clauses together the words sufficiently indicated an intention to pass the real as well as personal estate.

The courts will use their utmost endeavours to arrive at the intention of the testator, and where the intention appears they will not lay too minute a stress on the precise signification of words ; and where the words will bear two senses, one agreeable to and the other against law, that sense will be preferred which is most agreeable thereto.

If there be two clauses in a will totally repugnant and irreconcilable to each other, the first will be rejected and the latter will stand ; and where the words of a gift are of themselves plain, distinct, and capable of having a legal effect, effect must be given to them notwithstanding any [ \*33 ] improbability which may arise from \*looking at other parts of the will. On the other hand, if the words are ambiguous in expression or effect, they will not be rejected for uncertainty ; but from the other parts of the will must be collected an indication of what the testa-

(a) Where a will creates a trust for sale or mortgage of an estate, the instrument should empower the trustee to give a receipt, which receipt should be declared to exonerate the purchaser or mortgagee from seeing to the application of his money ; without such exonerating clause, equity holds it obligatory for the purchaser or mortgagee to see to the application of the money according to the trust with some few exceptions—but a purchaser from an executor or administrator will not be bound to inquire after debts or legacies, where he purchases *bona fide* and without notice that there are no debts, but it is otherwise if he has notice.

(b) Wright v. Shelton, 16 Dec. 1853.

tor meant by those words which by themselves appear to be ambiguous(c) —so where it is dubious on the face of a will whether a specific or general legacy is given, the court will lean to the construction in favour of the legacy being a general one;(d) and if it is doubtful whether or not an absolute interest is given by a will, the subsequent disposition of the subject-matter of the gift, in every possible event which can arise, must be considered, in putting a construction on those ambiguous terms, such a disposition being apparently inconsistent with the intention of giving an absolute interest in the first instance, the above was laid down in *Lassence v. Tierney*, 14 Jur., 183; the court observing, if a testator leaves a legacy absolutely as regards his estate, but restrains the mode of the legatee's enjoyment, adopted to secure certain objects for the benefit of the legatee, on failure of such objects the absolute gift prevails; but if there be no absolute gift, as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it—it is, however, obvious, that the intention that the gift should be absolute as between the legatee and the estate, is in all cases of construction to be collected from the terms of the will, and not from their being words which, standing alone, would constitute an absolute gift. So where words which, standing alone, would have amounted to an absolute gift, but special provisions followed, which failing it was held the fund was undisposed of;(e) and where there was a direct pecuniary gift, to be employed for the use of the legatee in a particular manner, and the manner of employment having failed, the legatee's title was considered absolute.(f)

Upon a question arising as to whether, upon the construction \*of a will, the gift to the children of the testator's daughter was [ \*34 ] void for remoteness, or whether they took a vested interest, Lord Langdale, M. R., observed, "where there was a gift to such a class or description of persons who should attain a certain age, those who did not attain that age must be excluded from the benefit of the legacy by the testator's description;(g) but a direction to pay to an indefinite class when and as they shall attain a certain age, does not necessarily point to the exclusion of any, the words might be only intended to postpone payment, without postponing the vesting. There being such an ambiguity as to the testator's meaning, it was necessary to look to the other parts of the will for an indication of the intention.

It may be collected from the modern decisions upon the construction of wills generally, that it has become an established rule, in arriving at the true intention of the testator, where ambiguities arise, to read the different clauses of the same will referentially to each other, unless they are clearly independent;(h) and to arrive at the meaning of a testator, the words of a clause in a will must not be added to or transposed, pro-

(c) *Wilson v. Eden*; 11 Beav., 289.

(e) *Gompertz v. Gompertz*; 2 Ph., 107.

(f) *Campbell v. Brownrigg*; 1 Ph., 301.

(g) *Harrison v. Grimwood*; 13 L. J. C. 485.

(d) 7 Hare, 382.

(h) *Ford v. Ford*; 6 Hare, 492.

viding they are susceptible of a reasonable construction as they stand; (i) but where it is evident that the intention of the testator is clear, but wrong words have been made use of which will not admit of a reasonable construction, the court will remedy the defect; for where a testator gave a sum in bank annuities to his wife, and it turned out he had no other stock at the date of the will than long annuities, the court directed the legacy to be paid out of the latter, and moreover admitted evidence to show that the testator had no such stock at the date of the will, having previously sold it and invested the proceeds in long annuities. (k)

An instrument executed under peculiar circumstances will be construed to take effect as a will in the event of a parties' death, before which it would have been looked upon as a different instrument; thus, P. being in India in 1840, executed the following instrument, attested by two [ \*35 ] witnesses:—Know all men, &c., \*that I make, &c., E. my lawful attorney, for me and in my name and to my use, to ask, demand, &c., or receive the possession of or produce of the rent of the freehold of, &c. And I do empower her, the said E., to hold and retain all proceeds of the said property for her own use, until I may return to England and claim possession in person; or in the event of my death, I do hereby, in my name, assign and deliver to the said E. the sole claim to the before-mentioned property, to be held by her during her life, and disposed of by her as she may deem proper at the time of her death; at the same time I wish it to be understood that I claim all right and title to the said property on my arrival in Great Britain, when the term of the said E.'s occupancy shall be considered as at an end. In witness, &c. The instrument was acted upon as a power of attorney; afterwards P. died in India without returning to Great Britain, and left E. surviving; it was determined it would operate as a will—Williams J. observing, "The power of attorney operates in one event only, and for a certain time, but it by no means follows that the instrument may not take effect as a will in the event of the parties' death."

#### WHEN EXTRINSIC EVIDENCE IS ADMISSIBLE TO REMOVE AMBIGUITIES.

Extrinsic evidence is admissible to remove ambiguities which arise upon the application of the terms of a will to the persons and subject-matter to which they relate. (l)

Thus, where an interest was given by the express terms of the will to A. B., the second son of C. D., and A. B. was in fact the third son and E. F. the second son of C. D., the court of King's Bench determined that evidence of the state of the testator's family and other circumstances were admissible, and that on such evidence it was for the jury to find whether the testator had made a mistake in the name of the devisee or not: that if no such evidence were given on the trial, it would be a mere question of law as to the intention of the testator, to be collected only from the will itself, upon which the judge might direct the jury, and it would be open to neither party to tender a bill of exceptions. (m)

(i) Walker v. Tipping.  
(l) 3 Stark; L. E. 1269.

(k) Selwood v. Midway; 3 Ves., 306.  
(m) Doe v. Huthwaite; 3 B. and A. 632.

\*Evidence of the facts and circumstances in respect of which the terms of a will are to be applied, are necessarily admissible [\*36] for the purpose of applying them in the strict and primary sense; (n) and Lord Kenyon has laid it down, 6 T. R. 352, "that it is an universal rule, that where words are used which have acquired a precise and technical meaning, no other meaning can be applied to them—for that, in the language of the courts, would be to remove land-marks." So where the terms of the instrument are capable of application in their strict and primary acceptation, they must be applied in that sense and no other—but where it appears, from evidence of the material facts, that the terms of a will are incapable of application in their strict primary acceptation, evidence is admissible to show that they are still capable of application in a secondary sense in order to apply them.

It is also a general rule that not only material facts, but also declarations made by the testator, are under certain circumstances admissible, when necessary in order to ascertain the person or thing intended—that is, the object of the testator's bounty, or the subject of disposition, where the terms are applicable indifferently to more than one person or thing; (o) and where terms of art are used in a will, extrinsic evidence will be admitted for their explanation, as well also for the explanation of foreign expressions.

If, on the face of the will, its terms be so ambiguous as to be incapable of any certain application, it is void in point of law: for in such a case, to admit evidence to give it one meaning rather than another, when it was equally capable of both, or incapable of expressing either, would be not to construe or apply, but to make a will; (p) so also the devise will be void for uncertainty, notwithstanding the ambiguity is a latent ambiguity, capable of being explained by parol evidence, where that evidence does not explain what the testator actually meant—thus, where A., having two separate closes in Dale in the occupation of B., devised to C. the close in Dale in the occupation of B.—C. cannot entitle himself to both closes by showing that A. supposed the property \*occupied by B. consisted of one close, nor is it a case for election. (q) [\*37]

The Ecclesiastical courts hold that, when there is an ambiguity on the face of a will, parol evidence is admissible.

There are two sorts of ambiguities of words, observes Lord Brougham; the one is *ambiguitas patens* and the other *latens*. Patens is that which appears to be ambiguous upon the deed or instrument—Latens is that where the intention seemeth certain and without ambiguity; for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed, that breedeth the ambiguity.

*Ambiguitas patens* is never holpen by averments, and the reason is because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law, for that were to make all deeds hollow and subject to

(n) 3 Stark. 771.

(o) Ibid. 769.

(p) Ibid. 1272.

(q) Richardson v. Watson; 1 Nev. and Man. 567.

averments, and so, in fact, to pass without deed that which the law appointeth shall not pass but by deed.(*r*)

The courts endeavour to ascertain and are guided by the intention of the testator, gathered from the circumstances of each case in construing what shall operate as a will, and therefore will receive parol evidence where there is an ambiguity on the face of the instrument, but not otherwise;(s) and to admit parol evidence in the court of probate there must be some ambiguity, not upon the construction but upon the *factum* of the instrument—not whether a particular clause will have a particular effect, but whether the testator meant that particular clause to be a part of the instrument. Whether a codicil was intended as a republication of a former or a subsequent will—whether the residuary clause was fraudulently introduced without the knowledge of the testator,(*t*) as where a party nearly blind made a will, and the attorney who drew it inserted a clause giving the residue to himself, parol evidence was admitted to show that this was contrary to the intention of the testatrix.

[\*38] So the court will allow \*parol evidence to prove the testator was ignorant of a certain particular fact, as that he was ignorant that an attorney had inserted in a will the words “for his own use and benefit” instead of “as trustee,” and will order the words to be expunged—it will also admit parol evidence to show what was the intention of the revocatory clause, when it operated as a general revocation but was not intended so to do;(u) and it will also be admitted to prove facts and circumstances within the knowledge of the testator at the time of making the will, to explain a patent ambiguity, and to make the description of a person perfect;(v) but if the testator leaves property corresponding with the description in the will, evidence is not admissible to show that he intended other property to pass—thus it has been accordingly held that extrinsic evidence could not be given that the settlement on testator’s wife included a certain *freehold* close, mistakenly there enumerated as one of several *copyhold* closes settled, and which was, in fact, intermingled with the copyholds (as were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement) for the purpose of showing that, by the devise of “all his *copyhold* estates in North and South Collingham ‘after his wife’s decease,’ in trust, to be divided, &c.,” the freehold close in question passed.(w)

Lord Ellenborough, C. J., observes that the above case involved a general question of extreme importance. There is no ambiguity on the face of the will, the testator having *copyhold* estates in North and South Collingham to answer the description in it; nor is there any reference from the devise in question to the settlement, but by connecting it with the antecedent devise to the wife; and there is no such necessary connection. Nor does it follow that the testator meant to devise the *same*

(*r*) Wigram on Evidence, 170.

(*s*) D. Dorset v. L. Hawardees; 3 Curt., 83. Mounsey v. Blamire; 4 Russ, 384.

(*t*) Fawcett v. Jones; 3 Phill., 478. Thorne v. Rooke; 2 Curt., 815.

(*u*) Draper v. Hitch; 1 Hagg, 677. (*v*) Philips v. Barker; 17 Jur., 1146.

(*w*) Doe d. Brown and Bland v. Brown; 11 East, 441.

*premises* under the name of *copyhold*, to the trustees, as were settled on the wife; or that he was under the same mistake that the close in question was copyhold when he made his will as when he made \*the [\*39] settlement, consequently there is nothing appearing on the will to warrant a construction of the word *copyhold* so contrary to its ordinary acceptance, as to include the freehold in question.

#### WHEN PAROL EVIDENCE IS ADMITTED TO EXPLAIN A WILL.

In *Bernasconi v. Atkinson*,<sup>(x)</sup> which turned upon the uncertainty of the description of a person mentioned in the will, to whom there was a gift—Sir J. P. Wood, V. C., in the course of his judgment observed, that an intestacy is the very last resort which the court will be driven to adopt. That there is only one case in which parol evidence can be admitted to explain or aid in the construction of a will, and that is, where the description of the will is applicable to two different subject matters of devise, or two different objects of the testator's bounty: in other words, where the ambiguity is caused by extrinsic evidence, and the words of the will stand well on the will itself.

A most important rule was also laid down in the above case, viz.; that in deciding cases of this description, the language of the will must be assumed to be the language of the testator himself; because that, in the above case, the solicitor who drew the will said, in his affidavit, that the language was his rather than that of the testator, nevertheless such statements must be disregarded. In all cases the words are rather the expressions of the adviser than of the testator himself, but the testator must be taken to have read over and adopted the expressions used. So where words were erased from a will and others substituted,<sup>(y)</sup> but which could not take effect in consequence of their substitution not being made in conformity with the 21 sec. of 1 Vic., c. 26, and a question arose as to whether the probate should go out with the original words supplied by parol evidence or with the erasures in blank. Sir H. J. Fust appeared to rely on the case of *Brooke v. Kent*, where one word was substituted for another, and parol evidence was received to show what the original word was, and in this case allowed probate to pass with the original words.

\*A will must now be construed with reference to the real and personal estate comprised in it to take effect, as if it had been [\*40] executed immediately before the death of the testator, unless a contrary intention shall appear by the will—but it appears it is not necessary that such contrary intention should be expressed in so many words or quite free from doubt, if it is found, upon the fair construction of the will, adopting those rules in that construction which are usually adopted in construing wills, that the contrary intention does appear—and a devise of “all the estates of which I am now possessed or seised of,” with an indication of the word *now* having been used as alluding to the period at which the testator was making his will, was considered to be

(x) 17 Jur., 128.

(y) *Goods of W. Reeve*; 13 Jur., 370.

such a contrary intention as to take the case out of the general rule that, after acquired, property passes by a will.(z)

The time of the legatee's death is unimportant, provided he dies after the wills act came into operation, and the bequest to him by will is made after that time;(a) and it may be observable throughout the decisions as to the construction of clauses in wills, that the courts anxiously avoid construing anything into an intestacy.(b)

#### ESTATES BY IMPLICATION.

It has been before observed that a fee will pass without any words of inheritance, unless a contrary intention shall appear;(c) and by will an estate may pass by implication, as where there is a devise over of land to a third person, after the death of his wife, in such cases the apparent intention is carried out by giving an estate for life by implication, and avoiding the estate being in abeyance; and where a certain sum of money was bequeathed to a person, a nephew of the testator's, to maintain and bring up a natural child of the testator's, with direction that the interest of one-fourth of the testator's residue should be applied for the maintenance and education of the child during his infancy, and the capital to be paid to him on his attaining twenty-one, it was \*declared that [ \*41 ] the nephew was not a trustee of the money firstly bequeathed for the natural son, but was entitled to it for his own benefit;(d) and so where a testator bequeathed to his daughter fifteen thousand pounds, to be kept in trust by his executors till she should attain twenty-one, or marry with the consent of her mother and half of his executors then living, whichever might happen first, when the sum with the accumulated interest was *to be settled on her*—upon her attaining twenty-one without being married, it was determined that, as the legacy was not directed to be settled except in the event of her marrying under age, with the consent of her mother and half of the testator's executors, and as the legacy was given to her absolutely she was entitled to it absolutely.(e)

The omission of clearly stating in testamentary dispositions the description of the legatees, so that no doubt at any future time can arise as to the applicability of their taking under the peculiar devise, has occasioned many important questions to arise, from which it may be collected that the courts lean in favour of the bequest taking effect, nevertheless it is always advisable to guard as much as possible against the rights of the legatee being questioned, and in obtaining instructions for wills it is advisable to ascertain from the testator not only the names of the legatees but the position in life which they occupy, and whether they are legitimate children; for where specific legacies and the residue of personal estate were given to a testator's children nominatim, payable to them at twenty-one, or on marriage, and the residue of his real estate subject to the payment of an annuity to his wife and other trusts, between all his said children (but did not name them,) share and share alike, and

(z) *Cole v. Scott*; 14 Jur., 25.

(b) *Jennings v. Baily*; 17 Jur., 433.

(d) *Biddles v. Biddles*; 16 Sim. 1.

(a) *Winter v. Winter*; 5 Hare, 313.

(c) 1 Vic., c. 26, s. 28.

(e) *Arnold v. Arnold*; 18 L. J. C. 90.

directed that in case any of his children by his second wife should die without issue before he or she should attain twenty-one, that the interest of each, in his the testator's last-mentioned real and personal estate, together with the therein before mentioned legacies bequeathed to them respectively, should go between his said wife and such of his children by her as should \*be living, one of the legatees, who was an illegitimate daughter by the second wife, was declared to be entitled [ \*42 ] to share with their legitimate children in the residue of the testator's property.(f) So a bequest to each person as a servant in testator's domestic establishment, at the time of his decease, of a year's wages, "beyond what should be due to him or her for wages," was held to include a head gardener who lived in a garden-house until it was pulled down, and subsequently resided in a house provided by the testator, and whose house was attended by the servants of the testator; and even where a testator devised to A. B. (a natural daughter of A. B., of G., single woman, and who formerly lived in his service) an estate "for life," remainder to her children—at the date of the will no person answered this description; although A. B. had formerly lived in the testator's service and had a natural child, which was a son, and was named John Abbott, and moreover was not then herself a single woman, but was married and had a legitimate daughter, yet upon the death of John Abbott it was determined his children were entitled.(g) Nevertheless a person will take under a devise where the entire description is not thoroughly applicable, where it can be collected that such is the intention of the testator, evidenced by the particular circumstances of the case; for where the testator, who had a wife, Mary, to whom he was married in 1834, and who survived him in 1840, but nevertheless went through the marriage ceremony with a woman whose christian name was Caroline, and who continued to reside with him until the time of his death, shortly before which he devised certain property to his wife Caroline, her heirs, &c., absolutely, Caroline took under this devise, notwithstanding the entire description was not applicable.

In some cases, where a testator is found to have given two inconsistent directions, and has said that the children or all the children shall participate in the fund, and then directs that there shall be a division when and so soon as each attains twenty-one, the court must necessarily either sacrifice the direction that gives \*a right to distribution at twenty-one, or sacrifice the intention that all the children shall take.(h) [ \*43 ]

The word "family" will not be construed as to create a joint tenancy where there is a bequest for life, with a direction for the property afterwards to remain in the devisee's family, but the devisee's children will take as tenants in common;(i) so a bequest of personal estate upon trust, to assign the same to four persons, "and to each of their respective heirs, executors, administrators and assigns," will create a tenancy in common only;(k) and where the words of the devise are intended to create a joint tenancy, such intention should be direct and positive.

(f) *Evans v. Davis*, 18 L. J. C., 180. (g) *Ryall v. Hamane*, 10 Beav. 536.

(h) *Per Wigram, V. C. Mainwaring v. Beevor*, 14 Jur. 59.

(i) *Owen v. Penny*, 14 Jur. 359. (k) *Gordon v. Atkinson*, 1 De G. and S. 478.

## TERMS LEGAL REPRESENTATIVES.

The terms legal representatives, when made use of in a will, do not mean executors or administrators, according to the general acceptance of the terms,<sup>(l)</sup> but next of kin; and where a will, not affected by the 11 Geo. IV. and 1 Wm. IV., c. 40, commenced, "I give, devise and bequeath all my estate, real and personal, to W. E., his heirs, executors or administrators, to and for the uses, intents and purposes following;" then followed certain declarations of trust, but applicable only to particular portions of the personal estate, and the will concluded by appointing W. E. sole executor, W. E. took the residue as trustee for the next of kin.<sup>(m)</sup> So a gift of property in trust for one for life, and then to such person or persons as should then be entitled thereto as the testator's *next of kin*, under the statute made for distribution of the effects of intestates, the next of kin of the testator, at the death of the tenant for life, took as tenants in common, the Statute 22 Car. II., c. 10, determining the mode of taking as well as the persons entitled, and that the wife was not one of the next of kin under the statute;<sup>(n)</sup> and where there was a reversionary bequest to the testator's sons, by name, and in [ \*14 ] \*case of the decease of all or any of them in the tenant for life's lifetime, to their legal *personal* representatives, the executors were held to be entitled in exclusion of the next of kin;<sup>(o)</sup> but the words "*mother's relations*" being used in a will in pursuance of a power, were construed to mean next of kin of the testator's mother, according to the Statute of Distributions.<sup>(p)</sup>

## DOCTRINE OF CYPRES.

The doctrine of cypres is an equitable doctrine, and is applied where there is an excess in an appointment under a power executed by will affecting real estate, by the court carrying out the power as near (*cypres*) the testator's intention as practicable, and prevent such excess disappointing the general design.

The doctrine does not apply to personalty, it is also expressly confined to wills; it does not extend to limitations by deed of either real or personal estate, and in *Brudenell v. Elwes*,<sup>(q)</sup> Lord Kenyon refused to extend the doctrine to a limitation in a deed executing a power—and in those cases where a literal execution of a power under a will becomes inexpedient or impracticable, the court will execute it as nearly as it can, according to the original purpose *or cypres*.

The doctrine, as applied to the construction of a will, cannot be used to carry an estate to a class or part of a class of persons for whom the testator never intended to provide, and contrary to the express limitations;<sup>(r)</sup> and there must be an actual necessity in the construction of a

(l) *Walker v. Camden*; L. J. C. 488.

(m) *Mapp v. Elcock*; 13 Jur., 290.

(n) *Horne v. Colman*; 17 Jur., 408.

(o) *Hincliffe v. Westwood*; 17 L. J. C. 167.

(p) *Davidson v. Proctor*; 14 Jur., 31.

(q) 1 East, 451.

(r) *Moneypenny v. Veering*.

will to warrant the court in even sacrificing a particular intent to a general intent.

Lord Cranworth, in adjudicating upon the case of *Grundy v. Pinniger*,(s) said, "The view I take of the principle to be guided by is this—that whatever the difficulty may be of reconciling the cases upon this subject, and cases upon analogous subjects, the great cardinal rule to which to bring questions of this sort, is that which is pointed out by Mr. Justice Burton, namely, to adhere as closely as possible to the literal meaning of the words; \*when once you depart from that canon of construction, you are let into a sea of difficulties which it is [ \*45 ] hard to fathom."

It must be observed, in alluding to contingencies created by testamentary dispositions, that the contingency or the event which the testator speaks of as a contingency, is always referable to the period of payment or distribution, except in the single case where there is a simple gift to A., and if he should die without having issue then to B., in which case it cannot be referred to any period of distribution, but must be a general contingency to go over.

Thus, where a testator gave all his freehold and leasehold property to trustees, upon trust, to pay the rents to his wife for her life, if she should so long continue his widow, and directed that, in case of her marrying again, she should receive an annuity—and he then disposed of the property among his three children, the gift to take effect in possession immediately on the decease or marriage of the widow—and there was also a direction for his trustees to make over the shares of the children to them immediately upon the widow's death as soon as they arrived at the age of twenty-one years; and further, that if one of his children should die, leaving no children, his or her share should be equally divided between the other two and for their heirs for ever; and if two of his children should die, leaving no children, their shares should go to the surviving one and his or her heirs for ever. The share of a child who attained twenty-one, and survived the widow, it was determined did not go over on his subsequently dying without leaving children.(t)

#### MEANING OF "DIE WITHOUT ISSUE."

The 1 Vic. c. 26, s. 29, expressly declares how the words "die without issue" or "die without leaving issue" shall be construed, and unless a contrary intention appears by the will, the real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime \*of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, [ \*46 ] shall be included in the residuary devise, if any contained in such will.(u) So a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will or

(s) 16 Jur., 488.

(t) *Edwards v. Edwards*; 16 Ju., 259.

(u) 25 Sec. 1 Vic., c. 26.

otherwise described in a general manner, and any other general devise which would describe a customary copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, will be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold and leasehold estates or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention appears by the will; (v) and the word "estate," in the operative part of a will, passes the corpus of the property and all the interest of the testator in it, unless controlled by the context; but where the word is not used in the operative clause of the devise, but is introduced into another part of the will referring to it, such word will not be construed as having the effect of extending the meaning of the operative clause, whether prior or subsequent. (w)

And where a testator having, by his will, made a marked distinction between his real and personal estate, gave the residue "of his personal estate, goods and chattels, to his brother absolutely," and he devised "all and singular his manors, lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments," situate at or near W., "and all other his real estates in W. and elsewhere in Great Britain" to trustees for his brother for life, with remainder to his first and other sons, &c. It was determined first, upon the context of the will, that the testator's leaseholds for years passed under the residuary bequest to A. absolutely, and not in strict settlement with the real estate; and secondly, that although the wills act (1 Vic., c. 26) was applicable to this case, still that the 26th sec. (which enacts that a devise of the land of a testator, &c., shall be construed to include leasehold estates to which such description shall extend, unless a contrary intention shall appear) [\*17] did not affect the above construction. (x)

#### AS TO WHAT WORDS WILL CREATE A TRUST IN A WILL GENERALLY.

It appears (y) words accompanying a gift or by bequest expressive of confidence, or belief, or desire, or hope, that a particular application will be made of it, will be deemed to impart a trust, if so used as to exclude all option or discretion in the donee or devisee, and the subject and the object of the gift be certain and definite. Moreover, it is enough if it appear that a trust was intended, and it is not necessary that it should be effective or valid in order to exclude the legatee from a beneficial interest.

A general bequest to A. B., "well knowing that he will make good use and disposition of it in accordance with my views and wishes," has been held to create a trust; but the words "I give all my property to my wife, in the fullest confidence that she will dispose of it for the joint benefit of herself and my children," are of themselves insufficient to create a trust. (z)

(v) 26 Sec. 1 Vic. c. 26.

(w) 18 L. J. 59.

(x) *Wilson v. Eden*; 12 Jur., 488. 17 L. J. C. 459.

(y) *Briggs v. Penny*; 21 L. J. C. 265. 18 Jur., 93.

(z) *Webb v. Woolly*; 19 L. J. C. 153.

A bequest made to A. B., "to the uses of a letter signed by them and the testator," there being then no such letter, but subsequently a note being addressed by him to the executors, stating his wishes as to the disposition of the money, is no trust, but forms part of the residue. So a condition annexed to an appointment, and inconsistent with the power, is void; for where a testator, having power to appoint by will a sum of £3000., made his will, giving his general estate to his children for life, with remainder to their issue, and after referring to the above power, appointed the fund amongst his children, and requested them not "to spend the shares thereof, but to leave the same for the benefit of their children," these words did not constitute a trust for the grandchildren, so as to put the children to their election, but amounted to a condition annexed to the appointment \*in favour of children, and the condition was void, as being inconsistent with the power. (a) [ \*48 ]

## ESTATE TAIL.

It has been before observed under what circumstances the legal words of inheritance, usually applicable to the passing of a fee simple, are in the construction of devises dispensed with, and the Courts have been guided in a great measure by the same doctrine of intention in regard to the construction of wills where the necessary legal words to create an estate tail have been omitted, but where it can be collected from the expressions used that an estate tail was intended to be created. Estates tail are either general or special—general where lands are given to one and *the heirs of his body begotten*; and in this case it matters not how often the donee is married, for his issue in general, by each marriage, are capable of inheriting the estate tail *per formam doni*. Tail special differs from the above, inasmuch as the gift is restrained to some particular heirs of the donee's body, as where the gift is to the donee and the heirs of his body, on some particular person to be begotten; so again the estate may be given in *tail male* or *tail female*—and it is a rule that, upon the creation of an estate tail male, the females cannot inherit, and so *e converso* the heirs male, where the gift is in tail female.

The latitude which the law will afford in carrying out the intention of a testator, where it is apparent that an estate tail was intended to be created, but the words are not the legal words of inheritance, is observed upon by Littleton, (b) who says, "If a man give *done* (which signifies by deed) land or tenements to another, to hold to him and to his heirs males, or to his heirs females, he to whom such gift is made hath a fee simple;" but Coke says, "If a man, by his *last Will*, devise lands or tenements to a man and his heirs male, this, by construction of law, is an estate tail, the law supplying those words (of his body.) So a devise to one *et heredibus legitime procreatis* is tail, in *Naufan v. Leach*, (c) where the devise was to the testator's wife of a cottage for life, and \*after her death or marriage to the testator's son, as soon as he [ \*49 ] should attain twenty-one, and to his heirs for ever. To whom also he

(a) *Blacket v. Lamb*.(b) *Co. Litt.* 27 a., s. 31.(c) 7 *Taunt*, 85.

devised his land and estate in fee simple where he then lived (except the former bequest to his wife) upon his attaining twenty-one, and to his heirs lawfully begotten for ever, this was held to give an estate tail to the son in the land, and an estate in fee simple where the testator lived; so in a will, the words "his own right, heirs male for ever," have been construed to mean heirs issuing from a particular body, and indicative that the fee was not intended to pass, but only an estate tail;(d) and the words "heirs male" in a will are always intended of the body, and imply an estate tail; so under a devise of land to the testator's son, his heirs and assigns for ever, but in case his son should die without issue, then to go to the child of which his second wife was *enceinte*, passed an estate tail to the son.(e) On the other hand, in *Abraham v. Twigg*, it was held that a feoffment to A. and his heirs "lawfully engendered" would not carry an estate tail. It is thus presumed, that where in a will a sufficient intention of giving over can be collected from the face of the instrument, it will be looked upon as indicatory that special heirs only were intended to take, and will be sufficient to warrant an entail being created.

[ \*50 ]

## CHAPTER IV.\*

## CODICILS.

Meaning of the word Codicil.

Must refer to former Will.

What term Will includes when so referred to.

Construction given to technical words.

Different Instruments written on the same paper.

As to the effect of Revocation by a Codicil.

How far Re-execution of Will extends.

Effect of Re-publication of a Codicil.

How Informal Codicil may be rendered Valid.

It often happens that, after a person has made his will, he wishes to make some alteration in it, either as to the disposal of his property or otherwise; when such is the case there is no necessity for a fresh will, as his intentions may be carried into effect by a codicil, which is looked upon as a supplement to his will, and may contain anything which he wishes to add thereto, or any explanation or revocation of what the will contains, or the appointment of additional trustees or executors.

It must be observed, in making such codicil, that it should clearly refer to the former will, and be executed and attested in all respects in the same manner as a will; for it has been held that a codicil, duly executed in 1847, and commencing "by this codicil to my will," did not include under the term "will" unattested additions written subsequently to the operation of the wills act.(a)

The construction to be given to technical words, when used in testa-

(d) *Ford v. Ossulstons*, 2 Mod. 119.

(e) *Doe d. Ellis v. Ellis*, 9 East, 382.

(a) *Haynes v. Hill*, 13 Jur. 1058.

mentary papers, is that which they bear in their technical sense,<sup>(b)</sup> and that construction cannot be put upon the word "*will*" so as to include those papers which are not executed according to the provisions of the law.<sup>(c)</sup> In *Haynes v. Hill*, the testator left a \*duly executed will and two codicils signed but unattested, all dated previous to [ \*51 ] the 1st of January, 1838—and subsequently he wrote several other codicils, signed and unattested, on the same sheet of paper as the will—and first two codicils; and subsequently to this, by a further codicil duly executed, he referred to his will by the words "By this codicil to my will I bequeath," &c., "independently of all other bequests in my said will." This last codicil was found separate from the other instruments, and had never been placed with them; it was determined that by the word "*will*" the codicils subsequent in date to the 1st of January, 1838, were not sufficiently identified to be ratified by the last codicil, there being other papers to which the word was legally applicable.

As there is no restriction as to the number of codicils a person may make, it is advisable for each codicil to refer to the preceding one, thus showing whether it is the first, second third, fourth, and so on—to avoid also any questions of identity, it is advisable that the codicil, if not written on the same paper as the will, be attached to it, as it may operate as a re-execution of the former will and remedy any defect in its execution; for where a testatrix having made a will, but which was not executed according to the 1 Vic., c. 26, made also a codicil to her "last will" on a separate sheet of paper, but did not refer to her will by date—after the testatrix's death, the paper purporting to be a will and the codicil were found loose in a box and unattached, but wafer-marks on the papers were strongly indicative of their having been annexed, there being no other testamentary paper, and the codicil referring to two bequests in the paper purporting to be the will, the court considered that the paper purporting to be the will must be considered as such, being republished by the codicil, which was duly executed.<sup>(d)</sup> But where, before the wills amendment act, the testator left a will and four codicils, the will and first codicil being duly executed, the second codicil was properly witnessed, but signed by the deceased in the body of the attestation clause and not elsewhere, the third and fourth were duly executed and numbered 3 and 4, not referring otherwise \*to the second codicil, the second codicil was not entitled to probate.<sup>(e)</sup> Nor [ \*52 ] was a book in the testator's handwriting, although referred to by a will and proved in the Ecclesiastical court, but not attested so as to pass real estate, admissible in explanation of a will.<sup>(f)</sup>

Children, born between the making of the will and a codicil, will be excluded from taking under the will, in the absence of a clear intention that they should not be so excluded; this was determined in *Early v. Benbow* (2 Coll., 342), where there was a bill filed by the four children of Mrs. Early, claiming a legacy of £500 each—not merely those which

(b) *Wilkinson v. Adams*, 1 Ves. & B. 422.

(c) *Ferraris v. Hertford*, 3 Curt. 468.

(d) 2 *Robertson*, 298.

(f) *Adams v. Wilkinson*, 12 Price, 471.

(e) In *goods Littledale*, 13 Jur. 478.

were expressly given, but also further legacies under the words of the codicil, "to each child that may be born to either of my brothers' children;" Knight Bruce, V. C., deciding that the word "may" could not be read in so unrestricted a sense as to allow all those children of Mrs. Early as should be living at the death of the testator, including the four who had already gifts to them, to participate in the bequest in those words. Subsequently, upon the same codicil, Sir John Romilly observed,<sup>(g)</sup> "The question before me really amounts to this, whether I can read the word 'may' to the extent of letting in children who, being alive when the codicil was executed, are not mentioned in it—the words must be looked upon as prospective, and that they were descriptive of the persons to be born subsequently to the date of the codicil, and descriptive also of persons who were to be born subsequently to the date of the codicil but previous to the death of the testator."

#### WHERE DIFFERENT INSTRUMENTS ARE WRITTEN ON THE SAME PAPER.

Where different instruments are written on the same paper, and it appears to be the intention of the testator that all should constitute one instrument, the execution of the last will will be considered as an execution of the whole, even although the testator term the prior [\*53] instrument a will and the latter a codicil, \*and whether the subscription belonged to both instruments would be a question of fact for the jury.

#### AS TO REVOCATION BY A CODICIL.

The 22d section of the wills act enacts, "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revoked otherwise than by the re-execution thereof, or by a codicil duly executed, and showing an intention to revive the same."

Where there were circumstances raising a fair presumption that the testator did not intend to revoke the whole codicil, administration was decreed with the will and all the codicils annexed;<sup>(h)</sup> and under certain special circumstances, a paper will be admitted to probate as a codicil, although it does not *primâ facie* appear testamentary. Thus, where a person on his death-bed gave directions for the writing a paper in the form of a bill of exchange upon his agents, and the paper was signed in the presence of two witnesses who attested and subscribed the same, it was declared to be entitled to probate; Sir H. J. Fust, in the course of his judgment, observing—if the court should be satisfied that it was the intention of the deceased that it should operate as part of his will, and if the paper was duly executed in conformity with the provisions of the statute, the court would be bound to grant probate of it. Now looking at the paper it is certainly not *primâ facie* testamentary; the sum for which the bill is drawn is made payable to a trustee, but on the other hand it appears to have been signed in the presence of two witnesses, and it remained in the possession of the deceased until his death.

(g) *Early v. Middleton*, 15 Jur. 867.

(h) *In re Lewis*, 14 Jur. 514.

The re-execution of a memorandum dated 9th July, 1844, under certain circumstances, has been held to amount to a revocation of a codicil of 1843, being the revocation of a codicil by a codicil of a subsequent date; <sup>(i)</sup> and the court will grant probate of such part of the will as is not revoked by the codicil, where it is admitted that parts of the will are revoked. <sup>(k)</sup>

\*A testator gave the use, income, and enjoyment of certain personal property to his brother F., and after his death to the [ \*54 ] eldest son then living of C., C. had three sons, of whom W. was the eldest, and the testator afterwards made a codicil containing the following clause:—"I revoke so much of my will as relates to W., and I leave my brother F. in full enjoyment of all my property." This was a revocation of the gift to the eldest son of C., and a gift of the corpus of the property to F. <sup>(l)</sup>

Previous to the 1 Vic., c. 26, the revocation of a will was considered to operate as a revocation of a codicil, inasmuch as every codicil was considered as part of a will, and where the will was revoked it was *primâ facie* a revocation of the codicils; <sup>(m)</sup> but there have been cases in which the codicil has appeared so independent and unconnected with the will that it has been established, although the will was invalid; it nevertheless is a question of intention, to be collected from the circumstances of each case. <sup>(n)</sup> And a codicil may be admitted to proof, although the will, of which it purports to be a part, is not forthcoming. <sup>(o)</sup> For where a testator, two days before his death, executed a testamentary paper, commencing, "This is a codicil to the will of me," &c.—but it related solely to accounts between himself and the person with whom he was in partnership as a solicitor, and after his decease no will could be found, and the codicil being from the nature of its contents, wholly independent of any will, it was treated as a valid subsisting instrument, and administration with that paper annexed was granted to the widow, there being no executor or residuary legatee named in it. <sup>(p)</sup> And a codicil, merely revoking all former wills, is of a testamentary nature, and if proved will be entitled to probate. <sup>(q)</sup> So a codicil may operate so as not to revoke the beneficial devise in favour of a person, but only that in trust. <sup>(r)</sup>

\*RE-EXECUTION OF WILL EXTENDS TO CODICIL. [ \*55 ]

A testator, in 1843, executed his will, in which was contained a clause revoking all former wills, and afterwards duly made and executed a codicil confirming his will save as altered by his codicil; and subsequently he revoked the will, on the supposition that the attestation clause of the

(i) In goods of S. Perry, 4 N. C. 402 P. C.

(k) *Stride v. Sanford*, 17 Jur. 263.

(l) *Wells v. Wells*, Nov. 9, 1853, bef. M. R.

(m) *Coppin v. Dillon*, 4 Hagg. 369.

(n) *Medleycott v. Assbeton*, 2 Add. 230. 12 Jur. 422.

(o) *Tagart v. Hooper*, 1 Curt. 292.

(p) In goods of R. Halliwell, P. C. 23d June, 1846.

(q) 2 Robt. 162.

(r) *Hook v. Laslett*, 2 B. 1st June, 1852.

will was defective, but did not re-execute the codicil or refer to it, but it was decided that the re-execution of a will extends to and re-publishes, notwithstanding the clause of revocation, a codicil, unless an intention to the contrary appear.<sup>(s)</sup>

#### EFFECT OF RE-PUBLICATION OF A CODICIL.

The re-publication of a codicil is looked upon as the re-publication of the will of which it forms a part, and a codicil made in 1839, duly executed according to the provisions of the 1st & 2nd Vic., c. 26, to a will dated 1838, was held to revive such will; for every codicil to a will must be taken to re-publish that will, unless a contrary intention be shown from the contents of the paper, and this notwithstanding the provisions of section 22 of 1 Vic., c. 26.<sup>(t)</sup>

So an informal codicil may be rendered valid by a subsequent paper duly executed, and it was accordingly determined that a paper, termed a codicil, dated in 1845, but not duly attested, was rendered operative by a subsequent duly-executed codicil; there being under the circumstances of the case, sufficient to satisfy the court that the first codicil was sufficiently referred to and described, so as to be incorporated in the second.<sup>(u)</sup> And where a testator, by his will, dated in 1815, gave all the rest, residue and remainder of his personal estate, goods and chattels whatsoever and wheresoever (subject to the payment of his debts,) and all the estate and interest therein, to his brother M. D., to and for his own use and benefit, whom he also appointed sole executor—the will contained a devise of “all and singular his \*manors or lordships, [<sup>\*56</sup>] rectories, advowsons, messuages, lands, tenements, tithes and hereditaments, and all other his real estate in Great Britain and all his estate and interest therein, unto R. E.—in 1841 M. D. died, whereupon the testator made a codicil in July, in that year, whereby he appointed another executor, and then ratified, confirmed and republished his will, when it was determined that the re-publication of the will, by the codicil of 1841, being in compliance with the provisions of the 1 Vic., c. 26, s. 34, must be looked upon as being made at that date, and would come within the meaning of the 26th section, whereby a general devise of lands will include leaseholds as well as freehold, and consequently the leaseholds passed.<sup>(v)</sup> On the other hand, where a testator devised all his freehold estate which he purchased of C., by a will dated before, and re-published by a codicil dated after the 1 Vic., c. 26—and there was a small piece of leasehold land purchased with the estate by the testator of C.—and after making the codicil the testator purchased the fee in the leasehold; the codicil did not pass the after-acquired fee,<sup>(w)</sup> and was not, consequently, within the meaning of the 24th section of the wills act.

The observations with regard to the framing of a will apply also to a

(s) *Wade v. Nazer*, 1 Robt. E. 627. 12 Jur. 188.

(t) *Skinner v. Ogle*, 1 Robt. 363.

(u) *Ingoldby v. Ingoldby*, P. C. 7 Mar. 1846.

(v) *Wilson v. Eden*, 16 L. T. 152.

(w) *Ennes v. Smith*, 2 De G. & S. 722.

codicil, as its validity is subject to be impeached in like manner as a will—but a codicil written by the sole legatee therein named and inaccurately worded, and not produced until some time after the will, which had also been in the possession of the legatee, was pronounced for in the absence of evidence *directly impeaching its validity*.(x) And where a testator, by his will, gave the residue of his real and personal estate to his wife absolutely, and by a codicil he bequeathed some slave compensation money to his wife upon certain trusts as to half; and as to the residue thereof, “together with all sum and sums of money, estate and effects” which he might die possessed of or interested in, save and except the other moiety of the compensation money thereafter mentioned, upon trust, to receive the \*dividends arising from the investment thereof for her life; and after her decease he bequeathed the said [ \*57 ] moneys and securities in or upon which the same should be invested to other parties. It was determined, that it was not *clear* that the testator did not intend by the codicil to take away the rights conferred on the wife by the will, it was reasonably doubtful that he did so intend, and that therefore she was entitled, as residuary legatee, absolutely, and not for life.(y)

Where a person of unsound mind made a codicil to his will—on evidence of the subscribing witnesses to such codicil, which was not propounded, probate of the will alone was decreed.(z)

## CHAPTER V.

[ \*58 ]

### THE REVOCATION OF WILLS.

Power of Revocation.

Presumption of Law where Will is not forthcoming.

Implied Revocation.

As to alteration made in a Will after it is executed.

Implied revival of another Will—a revocation.

How revoked Will revived.

Revocation by cancelling Will.

THE power of revocation being an inherent power attendant upon an individual and remaining in the person, it naturally follows that it may be exercised at any period that person may think proper in deeds where it has been reserved, and in testamentary dispositions without any reservation being made; and in considering the subject of revocation by a testator, reference will unavoidably be made to the law as it existed prior to the 1st of January, 1838, more especially as the courts are careful of disturbing judgments which may have been acted upon prior to that period, and whereon many titles may have been founded, or in some measure depend. In all cases where a testator makes a will irrevocable

(x) *Barley v. Earl of Portarlington*, 13 Jur. 18 P. C.

(y) *Banbury v. Banbury*, 13 Jur. 1091.

(z) *Knight v. Richards*, 17 Jur. 216, P. C.

in the strongest terms, he is at liberty to revoke it, for he shall not, by his own act or expressions, alter the dispositions of law so as to make that irrevocable which is of an opposite nature.(a)

Where a testamentary paper is not forthcoming at a testator's death and it can be traced to have been in his possession, the presumption is that he has destroyed it, and such presumption may be acted upon unless there be evidence to repel such presumption by raising a greater probability to the contrary, and the onus lies on the party propounding the revoked will.(b)

[\*59] \*Marrying, and the birth of a child, *was* considered a constructive revocation of a will made by a person previous to his marriage, and now marriage alone is an absolute revocation; for by the 18th section of the 1 Vic., every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her customary heir, executor, or administrator, or the person entitled as his or her next of kin under the statute of distributions.

Implied revocations depended on the supposed intentions of the parties, collected from the circumstances of the case, but the revocation by marriage, and the birth of a child, was decided to take place in consequence of a principle of law, independent of any intention of the testator himself;(c) and where the *animus revocandi* was clear, it was determined to be immaterial that a writing, authorising the will to be destroyed, did not arrive (to the person in whose custody it was) until after the death of the testator;(d) but since the passing of the 1 Vic., c. 26, no will will be revoked by any presumption of an intention, on the ground of an alteration in circumstances.

And no will or codicil, or any part thereof, will be revoked, except in accordance with the wills act, or by another will or codicil executed in the manner required by the said act, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Any alteration made in a will after it has been executed, to be of any effect, must be made strictly in accordance with the provisions of the 1 Vic., c. 26, whether such alteration is merely an obliteration, or addition, or otherwise—for no alteration, interlineation, or other alteration made in any will after the execution thereof will be valid, or have any effect, except so far as the \*words or effect of the will, before  
[\*60] such alteration shall not be apparent, unless such alteration shall be executed in like manner as is required for the execution of the will; but the will, with such alteration as part thereof, will be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on

(a) 8 Co. 82.

(b) *Welch v. Phillips*, 1 Moore, 299.

(c) *Marston v. Roe*, 2 Nev. and P. 504.

(d) *Walcott v. Ochterlony*, 1 Curt. 580.

some part of the will, opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or on some other part of the will ;(e) and it has been before observed that the term will, when referred to by a codicil, does not include unattested additions in a will.

In practice, when any interlineation is made in any will before execution, it is proper to make reference thereto in the attestation clause, showing that such interlineation was made before the will was executed, and by so doing the addition or interlineation becomes attested as being a portion of the will.

Notwithstanding the leaning the courts have to construe against intestacies, it has been held that prior wills of real estate are revoked by a subsequent will, although the latter contains no express clause of revocation, and the result of the decision caused a partial intestacy.(f)

A. having, under a settlement, a general power of appointment either by deed or will, appointed by several successive deeds, in each deed revoking former appointments and reserving powers of revocation and new appointment by deed only—by a deed poll she afterwards revoked the last deed of appointment; by her will she made a devise, purporting to be in exercise of her original power of appointment; it was held that, after the execution of the first deed of appointment, the original power was gone, and therefore the will of A. was inoperative.(g)

A will *may* be revoked by the implied revival of another will ; thus, where a person left a will dated in 1845, and two codicils dated in 1846, and the unexecuted draft of a will dated in 1842, and this last will having been destroyed *animo revocandi*, and the \*first codicil clearly referred to the contents of the will of 1842, but did not [\*61] describe that will by date, speaking of it merely as the “last will”—upon an allegation being offered, propounding the will of 1845 and the two codicils, it was determined the codicils alone were entitled to probate, the will being revoked by the implied revival of the will of 1842.(h) But where a testator, being seised of freehold and copyhold property, made his will, ordering first that his debts should be paid, and then devising to his wife, for her life, his dwelling-house, croft, and garden, part of the freehold, with remainder over, and the will then proceeded —“Also I give, &c., unto my said wife, her heirs and assigns for ever, all my real and personal estate whatsoever and wheresoever unto me belonging, both freehold and copyhold, and now surrendered to uses of my will, and to have the same at my decease ; but if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same,” his wife and others were appointed executors ; it was determined that the latter clause of the will did not *revoke* the former, but gave the wife, in *addition* to her life estate in the freehold house, croft, and garden, an estate in fee in the copyholds and the other freehold property, leaving untouched the remainder created by the first clause.(i)

(e) Sect. 21.

(f) Plenty v. West, 17 Jur. 9.

(g) Evans v. Saunders, 17 Jur. 338.

(h) Hale v. Tokelove, 14 Jur. 817.

(i) Roe d. Snape v. Nevill, 11 Q. B. 466.

In *Evans v. Evans*, 17 Sim. 86, Sir L. Shadwell, V. C., decided that the devise of "real estates" in the fourth codicil passed the tithes, and therefore revoked the devise of tithes in the will—but Lord Campbell, in a very recent case,<sup>(k)</sup> alluding to the above, observed, that he felt himself obliged to adhere to a contrary opinion, and that the gift of the tithes in question to the plaintiffs remained unrevoked,—their right to life estates in succession under the will being clear and undisputed, it lay on the defendants to show that the devise in their favour in the will had been revoked; there is no express revocation, and reliance can only be placed upon a subsequent inconsistent disposition by codicil of the [ \*62 ] previously-disposed property. The leading case upon this \*subject is *Doe d. Hearle v. Hicks* (1 Cl. & Fin. 20; 6 Bligh, N. S. 37, Sugd. Law of Property as administered by the House of Lords, 214,) in which it was decided that a life estate, clearly given by a will to a testator's wife in a portion of his real estate, which was copyhold, was not revoked by a codicil by which he revoked several of the dispositions in his will, of all his freehold, copyhold, and personal estate and effects of all and every kind and description, and in the place of such devise, disposition and bequest, he devised and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter, and afterwards to his grandson. Tindal, Chief Justice in that case, delivering the opinion of the judges, on which the House of Lords acted, said, "The general principle upon which their opinion proceeded might be stated thus:—the testator does, by his will, show a clear and manifest intention to devise the estate in question to his wife, for her widowhood—if such devise in the will is clear, it is incumbent on those who contend it is not to take effect, by reason of a revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if there is only a reasonable doubt whether the clause of a revocation was intended to include the particular devise, then such devise ought, undoubtedly, to stand. Whether, therefore, this devise was revoked, must be determined not by any express words to that effect, but by the consideration whether, upon the construction of the codicil, the devise and disposition therein contained must of necessity be held inconsistent with the devise to the wife." The principle may now be considered established, that a revocation by a subsequent codicil, whether by express words of revocation or by a devise inconsistent with the former devise, will operate so far only as is necessary to effectuate the intention of the testator.<sup>(l)</sup>

Thus, there are four modes of revoking a will, viz.:—by marriage—by burning, or other act of the same nature—by another inconsistent [ \*63 ] will, or writing, executed in the same manner as \*the original will—and by the disposition of the property by the testator in his lifetime.<sup>(m)</sup>

A will may be either entirely or only partially revoked by the second

(k) *Williams v. Williams*, 17 Jur. 1093.

(l) *Evers v. Ward*, 16 Jur. 709.

(m) Sug. V. P.

method pointed out, and it may also be only partially revoked by the testator disposing of only a portion of his property in his lifetime, but by the other modes of revocation it is absolute.

#### HOW REVOKED WILL REVIVED.

No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner before required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.<sup>(n)</sup>

And no conveyance or other act, made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.<sup>(o)</sup>

The mere fact of a testator having destroyed his last will and preserved the first, has been held not sufficient *per se* to revive the first,<sup>(p)</sup> for it must be ascertained whether it was or was not the intention of the deceased that the first will should stand—the presumption of the courts inclining against rather than in favour of the revival of a former instrument.<sup>(q)</sup>

Where one entire part of a will, in duplicate, in the possession of the testator, was undestroyed, but the other part, in the possession of his solicitor, was destroyed by the testator on the \*executing of a subsequent will made in 1838, in terms revoking the prior will, [ \*64 ] the first was held to be revived by a codicil made subsequently to the second will, though referring to the first will merely by date; and that such reference was sufficiently indicatory of the intention to revive, as required by the 22nd section of the 1 Vic., c. 26, and that moreover parol evidence was not admissible to establish a mistake in the date.<sup>(r)</sup> And where a married lady, having under her settlement freehold property settled to her separate use, with power to dispose of it by will, exercised that power by devising a certain part of the property to A. for life, with remainder to her nephew, and gave all the other freehold tenements which she had in anywise power to dispose of, to her nephew for life, with remainder to his children. She afterwards purchased some leasehold tenements out of her separate property, and had them assigned to M. in trust, as she should by deed, will, or codicil appoint; and in exercise of that power, she by a codicil bequeathed the leasehold to her nephew, and confirmed her will. Some time afterwards she purchased the reversion in fee of the leaseholds, and had it conveyed to A. in

(n) 1 Vic. c. 26, sect. 22.

(o) Sect. 23.

(q) Wilson v. Wilson, 3 Phill. 554.

(p) Hooton v. Head, Phill. 31.

(r) Payne v. Trapps, 11 Jur. 155.

trust, as she should by deed or will appoint. She then made another codicil, in exercise expressly of the power reserved to her by the settlement and of all other power, and thereby, after reciting the specific devise made by her will, she gave the property which was the subject of that devise to A. in fee. The second codicil was not deemed a republication of the will, and therefore the reversion did not pass by the residuary devise in the will, but the testatrix died intestate as to it.<sup>(s)</sup>

So where a man, having children by a first marriage, made his will, and then upon his second marriage settled his personal estate on himself for life, then to raise £100 for his wife, and then to apply the personalty as he by deed or will should appoint, and in default thereof unto his issue—it was determined, upon the apparent intention, that the prior [\*65] will was wholly revoked.<sup>(t)</sup> \*And where a person who was dangerously ill made a will in favour of his *intended* wife, but afterwards recovered and was married, and had four children, who with the wife survived him, and the testator had carefully preserved the will and recognised it, but never re-executed it, it was determined to be a revocation.<sup>(u)</sup>

It is necessary to observe, that in the above case there appeared a tacit condition annexed to the will, at its execution, by which the court was guided in making its decision.

A will made under 1 Vic., c. 26, s. 11, remains operative unless expressly revoked, although the maker of such will lives in England several years after the date of that will. Thus, John Vaux Leese died in England in 1852, having made his will whilst in active military service in the East Indies, agreeably to the 11th section of the wills act, in the words following:—"I am just recovered from a rather severe bilious attack; lest another may leave me unable to will my goods away, or lest I am knocked over by a bullet, as we go against Gwalior to-morrow, this is my will and testament, made in gratitude for my late recovery. I have funds amounting to some 500 rupees in Government Savings Bank. This I will bequeath to my brother R. V. Leese, also the whole proceeds from the sale of my horses, buggy and furniture. My old Arab horse Nick is not to be sold, but to be given to Captain Siddons, of the First Light Cavalry, as a memo of my love and esteem. I am not indebted to any man except current expenses for housekeeping and clothes, to no great account; my clothes, therefore, I wish to be burnt.—J. V. Leese, Camp Lahore, near Gwalior, Dec. 23, 1843." Codicil.—"My horse Nick was shot under me at the Battle of Maharajpore, May 28th, 1844." The deceased returned to this country in April, 1845, and remained here ever since. Nothing passed under the will, as the property thereby bequeathed was disposed of, upon the question arising as to whether letters of administration should pass with the will annexed or without it. The court decreed administration with the will annexed.<sup>(v)</sup>

(s) Jowitt v. Beard, 12 Jur. 933. 18 L. J. 53 C.

(t) Leigh v. Norbury, 13 Ves. Junr. 340.

(u) Matson v. Magrath, 13 Jur. 350, P. C.

(v) In re, Vaugh. J., 17 Jur. 216.

## \*AS TO THE CANCELLING A WILL.

[\*66]

In legal consideration, a will may be cancelled without being revoked; the cancelling itself is an equivocal act, and in order to operate as a revocation it must be done *animo revocandi* a will therefore cancelled by accident or mistake is no revocation; (w) and the general position is, that the cancellation of a will does not necessarily infer any intentional abandonment of the dispositions contained in, nor consequently any revocation of it. In order to bar the application of this rule to any particular case, two things are at least requisite; first, it must have been proved by indisputable evidence that the cancelled paper once existed as a finished will. Secondly, it must have been shown by evidence equally indisputable, that the testator adhered to it throughout, in mind and intention, notwithstanding its cancellation. In the absence of either of these indisputable requisites, the ordinary presumption upon which a court of probate is bound to act is that the cancellation does not amount to a revocation. (x)

In deciding a question whether, by the destruction of a latter will, a prior one thereby became operative, Sir John Nicholl ruled, that it was not quite settled whether the principle was, that on the revocation of a latter will, a former uncanceled will was presumed to revive or not. The presumption may depend *prima facie* on the nature and the contents of the will itself, exclusive of circumstances *dehors* the will. If the latter will contains a disposition quite of a different character, the law may presume such a complete departure from the former intention, that the mere cancellation of the latter instrument may not lead to a revival of the former, but intestacy may be inferred. If, however, the two wills are of the same character, with a mere trifling alteration, it may be presumed, because it is the rational probability, that when the testator destroyed the latter he departed from the alteration and reverted to the former disposition, \*the latter presumption prevailing, the first was held to have been revived. (y) [\*67]

Where a testator gave his residuary estate in certain portions between his granddaughter and his four grandsons, and he afterwards drew a line through a material part of the bequest, and by a marginal note stated that one grandson being dead, and the other three being provided for, he intended to bequeath one thousand pounds to each of his grandsons and the residue between his two granddaughters, it was determined that this was a cancellation of the first bequest, and that the granddaughters were entitled to the whole fund, subject to the three legacies of one thousand each. (z)

(w) Burtenshaw v. Gilbert, Cowp. 52.

(x) Thyane v. Stanhope, 1 Add. 54. Waddilove, E. L. 350.

(y) Kirkenbright v. Kirkenbright, 1 Hagg. E. R. 326. Waddilove, E. L. 358.

(z) Ravenscroft In re, 10 L. J. 501.

[ \*68 ]

## \*CHAPTER VI.

## DONATIO MORTIS CAUSA AND LEGACIES.

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How a <i>donatio mortis causa</i> differs from other Legacies.	Accumulative Legacies.
Will not prevail as against Creditors.	Thellusson Act.
As to Checks and Bonds.	Ademption of Legacies.
Legacies, General and Specific.	Within what period Legacy is recoverable.
Lapsed, Vested, and Contingent.	When Interest is Payable on Legacies.
Conditions annexed to Bequests.	Who are incapable of taking Legacies.

A *donatio mortis causâ* is another method whereby, under peculiar circumstances, a person is empowered to dispose of any of his personal effects; thus, when in his last illness, or, as it is termed, *in extremis*, and apprehensive of the approach of death, he delivers, or causes to be delivered to or for a party, the possession of any of his personal effects, to keep in the event of his decease, such gift or donation is called a *donatio mortis causâ*. This gift, if the donor dies, does not, like other legacies, require the assent of the executor, but the interest of the donee is complete on the donor's death, and is accompanied with the implied trust, that, if the donor lives, the property so disposed of shall revert to himself, being only given in contemplation of death, or *mortis causâ*; and this, although the donor does not when he so gives it declare to be given in contemplation of death, the law construing such to be the case. It differs most materially from other legacies, inasmuch as there must be an actual delivery of the thing disposed of, in those cases where the subject will admit of such delivery; but if it will not admit of actual delivery, if the party go so far as he can by transferring the possession, as *intentio mea imponit nomen operi meo*, the gift will be complete—thus the delivery of the key of a warehouse in which goods were deposited, has been

[ \*69 ] held to be a good delivery of the goods for \*such a purpose.(a) It appears also to be established, that the delivery of the key of a trunk amounts not only to a delivery of the contents of a trunk, but also of the trunk itself, and that a bond will also pass to the donee, but it is otherwise with bills of exchange, promissory notes, and cheques.(b)

But in *Bonts v. Ellis*, 17 Ju., 585, where a testator, four days before his death, gave to his wife a cheque for £1000., made payable to herself or bearer, this cheque being crossed was exchanged by the wife, by the testator's direction, with a Mr. Billiter, for an uncrossed cheque upon the bankers of the latter, and made payable to Mrs. Ellis (the wife,) but which cheque was post dated, and therefore void; Mr. Billiter received the proceeds of the cheque of the testator shortly before the death of the latter, and after that event gave to Mrs. Ellis another cheque for £1000.

(a) *Ward v. Turner*, 2 Ves. Jur. 431.

(b) *Miller v. Miller*. *Tate v. Hibbert*, 4 Bro. C. R. 291.

in exchange for the one he had first given her, and this cheque was shortly afterwards paid to Mrs. Ellis by Mr. Billiter's bankers. Upon the question arising whether, under these circumstances, the proceeds of the cheque for £1000, given to his wife by the testator, was a good *donatio mortis causâ* to her, or whether it still formed part of the testator's estate, for which Mr. Billiter was responsible to the executors, it was held, affirming the decision of Sir J. Romilly, M. R., that this transaction was, in effect, a good *donatio mortis causâ* from the testator to his wife.

Where the obligee of a bond, five days before his death gave it to a niece, and signed a memorandum amounting to an immediate and absolute assignment of it, it was held, in the absence of evidence of how it came into the donee's possession (the assignment being unconditional, and not importing that it was to be restored if the donor should recover,) to be a *donatio mortis causâ*.(c)

A gift by a man in his lifetime cannot be construed as a *donatio mortis causâ*. Thus, Sir William Hedges gave by will, to two \*of his children, a specific legacy of a bond for three thousand pounds, [\*70] but being advised to give it to them by act in his life time, a line was drawn over those words in the will which gave the three thousand pounds, and the bond was altered, and a new security taken in trust for those children, and the will new published—the court decided that this could not be construed a legacy *causâ mortis*; but in this case the testator, Sir William, acted deliberately, and made his election that they should take a gift in his lifetime, and not by will.(d)

There should be no control stipulated to be exercised by the donor over the particular thing given, where the gift is intended as a *donatio mortis causâ*—for where the donor delivered a cash-box to another, desiring him to go, after his death, to his son for the key, and stating that the box contained money, to be entirely at the donee's disposal, but that he should want it every three months as long as he lived, and it was twice delivered back, but was in the donee's possession at the time of the death of the donor, the key being in the son's possession, ticketed in the name of the donee, it was held not to be a sufficient *donatio mortis causâ*, nor such a trust for the donee as the court would execute;(e) but a mere request or injunction by the donor will not make the gift inoperative as a *donatio mortis causâ*, for where a father had lent £950 to his son, who secured the money with a bond and a deposit of deeds, and the deeds were given up and deposited on another loan, returned, and again deposited on a further advance, the father then, in contemplation of death, delivered the bond to his son, in the presence of witnesses, accompanied with words "Take this, but don't wrong your children, and don't mortgage your property"—the son became a bankrupt, and upon a bill filed by the assignees it was held to be a valid *donatio mortis causâ*.

This species of gift will not prevail as against creditors. A gift of a cheque on a banker, pay self, or bearer two hundred pounds, and also of

(c) Edwards v. Jones, 7 Sim. 325.

(d) Mic. 7 Anne. Hedges v. Hedges, Gilbert, R. 12.

(e) Reddel v. Dobree, 10 Sim. 244.

[\*71] a promissory note, being absolute and \*immediate, was determined, on that ground, to be no *donatio mortis causâ*.(f)

And where a testator, being upon his death-bed, had delivered to his wife a purse of gold, containing about 100 guineas, and bid her apply it to no other use but her own, and likewise drew a bill upon a goldsmith to pay £100 to his wife to buy her mourning and to maintain her until her life-rent, meaning her jointure, should become due, and about seventeen days after died, the Master of the Rolls held the delivery of the purse was good, and must operate as a *donatio causâ mortis ut res magis valeat*, &c., because otherwise one could not give to his own wife, and this was in the nature of a legacy to the wife. The bill of £100 is good, and operates as an appointment; if the wife had received it during his lifetime it would have been liable to some dispute, but that he apprehended this amounted to a direction to his executors that the £100 should be appropriated to his wife's use, and he inclined to think, even if the wife had received it in the husband's lifetime, she should have kept it; that being for mourning, it might operate like a direction touching his funeral; the gifts were not extravagant (for then he admitted, equity ought not to make them good), the gifts were but £200, and the personal estate amounted to £8000.(g)

#### LEGACIES.

A legacy is a gift left by the deceased, to be paid or performed by the executor or administrator; and as it is a gift, it argueth that it proceeds from the mere good-will of the testator. Legacies are distinguishable into such as are general and such as are specific—the former are pecuniary, and the latter may consist of any particular article not being money. It is a rule that no legacy is considered specific unless it is clearly so intended, and specific legatees have certain advantages over those that are pecuniary only, inasmuch as they will not be called upon to abate, [\*72] upon a deficiency of assets, in common with the pecuniary \*legatees. A specific legacy vests immediately upon the testator's death; and where specific legacies are intended to be given, the words of the bequest should clearly state such intention, and a bequest of property vested in "bonds or securities" has been held not to pass canal shares which the testator had.(h) So under a devise to A. of the testator's house, with the lands thereunto adjoining, as then used and occupied by himself, and also all the household and other furniture, pictures, plate, books, and all other things whatsoever usually therein, or considered as belonging thereto, except only cash, bank notes, and securities for money—it was determined that neither carriages, carriage or riding horses used by the testator, nor farming stock and implements used by him in the cultivation of the land, passed, although on the land at the time of his decease.(i)

It has been before observed that a legacy requires the consent of the

(f) Tate v. Hibbert, 2 V. Junr. 4 Bro. C. R. 286.

(g) 1 Williams, 441.

(h) Hudleston v. Gouldsbury, 11 Jur. 464.

(i) Pennefather v. Bury, 3 J. & L. 727.

executor or administrator, and it is therefore illegal for the legatee to appropriate the legacy to his own use of his own sole authority, for the executor is the only person who can legally take possession of the testator's goods and chattels; but where there is no executor, or he is unable to act, or where the executor renounces, the legacies are payable by the administrator—where however, there are several executors, the assent of one to a legacy is sufficient.

The whole of the testator's debts should be satisfied before any legacies are paid; for if the legacies are paid, and a deficiency appears after the residuum has been exhausted, the legatees must be called upon to refund. As to the mode of executors ascertaining what claims there are against the estate, see post, chap. 7.

A legacy given to a charity, to be raised and paid out of such part of the personalty as could legally be charged with the payment of the same will also abate where the *general* personal estate is more than sufficient for payment of debts, funeral and testamentary expenses and legacies—but the *pure* personalty is insufficient.<sup>(k)</sup>

\*It appears established that where legacies are payable out of the general personal estate, and the residue only, after payment [<sup>\*73</sup>] of them, is directed to be laid out in the purchase of land, the legacies will not abate in favour of the devisee of the land to be purchased.<sup>(l)</sup>

#### AS TO LAPSED LEGACIES.

If a legatee die in the testator's lifetime the legacy is said to be lapsed, that is, merged in the residue—but since the wills act,<sup>(m)</sup> where any person being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Devises of estates tail will not lapse, for where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.<sup>(n)</sup>

The above exceptions however, it would appear, are only applicable where the bequest is to the issue of the testator, and where the interest or estate is not determinable before the death of the person to whom the bequest is made; for unless a contrary intention shall appear by the will,

<sup>(k)</sup> 18 L. J. 454.

<sup>(l)</sup> Jackson v. Hamilton, 3 L. J. 702.

<sup>(n)</sup> Sect. 32.

<sup>(m)</sup> 1 Vic. c. 26, sect. 33.

such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, [\*74] or by \*reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise contained in the will.(o)

It has been established that where money is given, to be paid at a future time out of a real estate, and the legatee die before the time, it sinks into the estate; so also the like rule prevails where a legacy is charged on real estate to be purchased with the residue of personalty—and where a testator gave pecuniary legacies to several persons, with a direction that the legacies should be paid with six months after his decease; and that, in case any or either of the legatees should die, not having received their respective legacies, and leaving any child or children, such child or children was to be entitled to their parent's share in equal proportions; and some of the legatees died in the testator's lifetime, leaving children—it was determined such children did not take their parent's legacy.(p)

It has been before observed, that a legacy may lapse where the gift is void, as being a charitable bequest, and so it appears in compliance with the old maxim, *accessorium non ducit sed sequitur suum principale*, a bequest was held void where a testator gave two thousand pounds stock to certain churchwardens, upon trust, to apply eight hundred pounds in erecting Almshouses, and directed the dividends of the residue, after the houses should have become fit for habitation, to be applied for the maintenance of poor persons residing therein, for as the trust for the erection of Almshouses was void, the trust as to the residue of two thousand pounds also failed, and the wholly legacy fell into the residue as undisposed of.

#### VESTED AND CONTINGENT LEGACIES.

If a legacy is bequeathed to one, to be paid or payable when he attains the age of twenty-one years, and he die before attaining that age, it is nevertheless a vested legacy, and will go to his executor or administrator, and is payable at the period when he would have attained the age the [\*75] legacy was directed to be paid \*to him had he have lived. It is an interest commencing in *præsenti*, though *solvendum* in *futuro*—the time, be it observed, being annexed to the payment and not to the legacy. Blackstone, in referring to the above, observes, this distinction is borrowed from the civil law, and its adoption in our courts is not so much owing to its intrinsic equity as to its having been before adopted by the ecclesiastical courts. For since the chancery has a concurrent jurisdiction with them in regard to the recovery of legacies, it was reasonable there should be a conformity in their determinations, and that the subject should have the same measure of justice in whatever court he sued.

Where, however, such legacies are charged upon real estate, in both cases they lapse for the benefit of the heir.

(o) 1 Vic. c. 26, sect. 25.

(p) Smith v. Oliver, 13 Jur. 159.

A bequest of residue of personal estate to trustees, to pay one-third of the income to testator's son for life, another third to his daughter R. for life, and the remaining third to his daughter M. and his granddaughter E. equally for their lives; and from and after the decease of his said children and grandchild, or either of them, there was a direction for the trustees to transfer the share or shares of him, her, or them so dying, of and in the principal stocks, unto, between, and amongst all and every the child and children of the testator's son, and daughters, and grandchild respectively, so dying, lawfully begotten, share and share alike, if more than one; and if but one child, to such only child—was construed to mean that each of the children of the son, living at the testator's death, took vested interests *immediately* on the testator's death.(g)

So vested interests may be taken under a will, on the death of a testator, subject to be divested, on their deaths, in the widow's life.(r) So also vested interests may be acquired subject to the rights of future-born children;(s) and where a sum of money was directed to be invested, and the payment of the interest to a daughter for life—the fund then to be held by the trustees to pay the same, or assign the securities whereon the same might \*be then placed, unto, between, and amongst all and every the child and children of his said daughter, as and [ \*76 ] when they should severally attain the respective ages of twenty-one years, in equal shares—"to whom I give and bequeath the same accordingly," with benefit of survivorship in case of death before the legacy should become payable, with a direction for maintenance, it was held the child of the testator's daughter, dying under twenty-one years of age, took a vested interest in the legacy.(t) "I think the expressions in this will clearly bring the case within the principle which has been well established and fully recognized in the case of *Leake v. Robinson*;(u) that is, that if there be a direct gift to legatees, a direction for payment when they shall attain a certain age shall not prevent the vesting of the legacy, and therefore the personal representative of the legatee so dying under the given age shall be entitled" (per Lord Crainworth)—but a legacy to the children of husband and wife has been held to mean only such children as were born at the testator's death.

#### CONDITIONS ANNEXED TO BEQUESTS.

A condition may be such as the law will not countenance, or render its assistance to have carried into effect, and such condition, where it is annexed to a gift, will be void, but the donee, by his non-performance of it, will not be prejudiced—it therefore is incumbent on the practitioner, in those cases where a testator may, either through selfishness or ignorance, wish such a condition to be annexed to a gift, to inform him of the consequences.

An allowance bequeathed to a feme covert, on condition that she lived

(g) *Salmon v. Green*, 13 Jur. 272. 11 Beav. 453.

(r) *Burrell v. Baskerfield*.

(s) *Ellis v. Maxwell*, 12 Beav. 104.

(t) *Bartholomew's Trust*, 14 Jur. 181.

(u) 2 Mer. 363.

apart from her husband, has been held good, but the condition being *contra bonos mores*, void.<sup>(v)</sup>

Where there is a condition annexed to a bequest of personal property tantamount to a prohibition of marriage, it is void—but on devises of the inheritance there may be such a condition, restraining the right of marriage, not amounting to an absolute prohibition. In the case of *Stockpole v. Beaumont*, 3 Ves., 98, \*in the course of the judgment it [\*77] was observed that, in deciding questions that arose upon legacies out of land, the court very properly followed the rule that the common law prescribes and common sense supports, to hold the condition binding where it is not illegal—where it is illegal, the condition would be rejected and the gift pure. When the rule came to be applied to personal estate the court felt the difficulty, upon the supposition that the ecclesiastical court had adopted a positive rule from the civil law upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent jurisdiction, in the resort to this court instead of the ecclesiastical court, upon legatory questions, which after the restoration was very frequent, and in the beginning embarrassed the court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the ecclesiastical court is impossible to be accounted for but upon this circumstance, that in the unenlightened ages soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books and transferred the rules, without weighing the circumstances, as positive rules to guide them.

The words, “and at the death of my sister M., I give and bequeath all the property I die possessed of in remainder to my own dearest niece B., subject to the annuity of one hundred pounds, as before named, to my sister P., but if my niece B. should be married at the time of my sister M.’s death (which event took place), I in that event bequeath my property, at the decease of my sister M., to my sister P. for life,” were held to be not in general restraint of marriage, but until marriage;<sup>(w)</sup> and where a person has once accepted a legacy in accordance with the terms in a will, preventing him from questioning the acts of the executors, he waves his right of afterwards proceeding against the executors for profits realised by them by the employment of a portion of the trust fund.<sup>(x)</sup>

A condition inconsistent with the gift is void, and so a \*condition [\*78] that a tenant in fee shall not alien is repugnant, but the gift itself, as before observed, will be good, and the condition rejected.

#### ACCUMULATIVE LEGACIES.

Where, in the same will, a sum of money is given for the same cause,

<sup>(v)</sup> *Brown v. Peck*, 1 Eden’s Reports.

<sup>(w)</sup> *Godfrey v. Hughes*, 1 Rob. E. R. 593.

<sup>(x)</sup> 11 Jur. 1023, 16 L. J. 509.

in the same act and *totidem verbis*, or with only a slight difference, a single and not a double or accumulative legacy passes.

The courts, however, are guided, in considering this doctrine, as to whether or not the legacy is accumulative, by the circumstance of the case, and in particular by the intention of the testator, collected from the face of the instrument. A distinction is observable in those cases where the words import only a substitutionary and not an accumulative meaning—and the courts will, unless the intention to substitute is clearly defined, consider the gift cumulative. In a case where a person bequeathed one thousand pounds to trustees, to apply the dividends for the maintenance of C. L. till twenty-two, then in trust for her absolutely, and by a codicil reciting this bequest the testator revoked the trusts of the one thousand pounds, and in lieu thereof declared trusts for the maintenance of C. L. till twenty-two, then for C. L. for life, for her separate use; and if she died leaving issue, in trust for her child or children, as tenants in common equally—but if without leaving issue, gift over. Another codicil, the last, contained these words, “I have altered my views respecting C. L., respecting the one thousand pounds as left in my will, and which I now think might prove a snare for her; I now leave five hundred pounds for her education and board.” Whatever might have been the effect of the gift of five hundred pounds by the latter codicil upon the gift of the one thousand pounds in the will, it was held not *substitutionary* for the gift in the former codicil; <sup>(y)</sup> but where S. D. gave, by his will, to his natural or reputed daughter, M. S., two thousand pounds for her separate use, and by a codicil he said, “I add three thousand \*pounds to the two thousand to which M. S. is [ \*79 ] entitled under my will;” and by a codicil made a few days before his death, and which in the attestation clause was published as his will, he said, “not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of twenty thousand pounds, for my daughter M. D.” &c., calling her by her own name, and not, as he had previously styled her, “M. S.” The last legacy of twenty thousand pounds was considered *substitutional* and not cumulative. <sup>(z)</sup>

To prevent questions of perpetuity arising with regard to devises by will, and to check in some measure the prejudicial results that would naturally arise by testators directing their estates to be retained to accumulate for lengthened periods, it was found advisable to introduce the 39 & 40 Geo. III., c. 98, commonly called Thellusson’s Act, whereby persons are prohibited, by deed or will, to dispose of any real or personal property in such manner that the rents and profits or produce thereof shall be wholly or partially accumulated for any longer term than the life of the grantor or settler, or the term of twenty-one years from the death of any such grantor, settler, deviser or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, deviser or testator: or during the minority or respective minorities only

(y) *Sawrey v. Rumney*, 17 Jur. 83.

(z) *Russell v. Dickson*, 17 Jur. 307.

of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property, so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be [\*80] received by such person or \*persons as would have been entitled thereto if such accumulation had not been directed.

This does not extend to any provision for payment of debts of any grantor, settler, or deviser, or other person, or to any provision for raising portions for any child or children, or any grantor, settler, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but all such provisions and directions are to be made and given as if the act had not passed.

The restrictions are to take effect with respect to wills made and executed before the passing of the act, in cases where the deviser or testator shall be living, and of sound mind, after the expiration of twelve calendar months from the passing of the act.

A devise of real and personal estate to trustees, to pay the rent and profits thereof to a granddaughter F. E., during her life, for her separate use, and after her death to sell and dispose of the same, and divide the proceeds between her children, upon their respectively attaining the age of twenty-one years, with remainder over to the children of testator's nephew, in like manner as he had bequeathed unto them a moiety of the residue of his estate and effects—with a power to the trustees to sell and convert the residue of his real and personal estates, and subject to the payment of his debts and legacies, he directed them to invest the proceeds and to accumulate the income, and to divide the principal and accumulations into two equal parts, and transfer one of such parts unto and amongst the children of his granddaughter F. E., the share of each child to be paid at the age of twenty-one or marriage, or to the executors of such child, if dying under that age and leaving issue; the shares of the sons to be considered as vested at twenty-one, or dying under that age and leaving issue, and of the daughters at twenty-one or marriage—the testator dying in 1826, E. F., the granddaughter, being living and unmarried, the period for accumulating the rent and profits of the moiety [\*81] of the residue intended for her \*children, it was held, expired in 1847, and that the direction to accumulate for a longer period was *void* under the provisions of Thellusson's Act (a)

Lord St. Leonard, in delivering his judgment in *Lord Barrington v. Liddell*, observes, “there is no magic in the word devise (in alluding to the 39 & 40 Geo. III., c. 98), it clearly means a disposition by will—

under any conveyance, settlement, or devise. I suppose a conveyance is clear enough. If, then, a man takes under a conveyance, does it signify under what part of the deed he finds it?—it cannot. A settlement—can it matter where it is found, so long as he has an interest in that settlement? A devise—can it possibly matter in what part of the instrument is found the particular interest which is created?—it cannot matter.

So a devise of real estate, upon trust, to raise a sum of two thousand pounds annually, for so much of the life of A. B. as should fall within twenty-one years from the time of the testator's death, and also during such other time of the life of A. B. as there should be in existence and actually born any child, entitled under the trusts to the accumulated fund—with a direction to the trustees to invest and accumulate the two thousand pounds at compound interest during the life of A. B., and the trusts of the accumulated fund to be for the younger children of A. B., and in default of younger children, for the executors, administrators, or assigns of A. B., subject to the ninety-nine years term—the testator devised the estates in strict settlement. A. B. was the testator's only child, and had himself only one son, who after the fund had accumulated for twenty-one years after the testator's decease, claimed the interest of the accumulated fund, and prayed the court would declare the annual sum should no longer be raised—when it was determined the gifts to the younger children were portions within the meaning of Thellusson's Act, but that the trust for accumulation was valid.<sup>(b)</sup> So where the rents of Irish estates were directed to be accumulated \*and become part of the personal estate, it was determined, that although Thellus- [\*82 ] son's Act did not apply to Irish estates, nevertheless it applied to the rents, as invested from time to time;<sup>(c)</sup> and that although the rents, which ought to be considered as *corpus*, might be invested for more than twenty-one years from the testator's death, yet that the income thereof could not.

It is a general rule that where two different instruments, as a will and a codicil, give separate legacies, whether of the same or of a larger amount, unless a clear contrary intention is apparent on the face of the instruments they will be looked upon as cumulative—but this may be repelled where there is internal evidence of an intended substitution;<sup>(d)</sup> but where the same sum is given to the same person by two instruments, but the latter upon a contingency, it will not be accumulative but an additional legacy.<sup>(e)</sup>

In claiming an interest under a deed or will, it has been before observed that full effect must be given to the instrument. So that where a testator believes he has property which really does not belong to him, and gives it to another, and gives to the real owner of the estate an interest by his will, the owner of the estate will not be permitted to take under the will, and also defeat the testator's disposition of his estate.

(b) *Beech v. Lord St. Vincent*, 14 Jur. 731. 19 L. J. C. 130.

(c) 12 Beav. 104.

(d) *Allen v. Callow*, 3 Ves. 289.

(e) *Hodges v. Peacock*, 3 Ves. 735.

## AS TO THE ADEPTION OF LEGACIES.

The ademption of a legacy is the taking of it away by the testator during his life, by an alienation of the subject of it or otherwise, or by it being even paid to the testator himself, which may be where a creditor pays a debt to a person who has bequeathed the same to him.

The ademption need not necessarily be in express terms, if by an indication of the facts and circumstances of the case the intension is clear, for the ademption may be by implication; so a legacy may be adeemed where a parent makes a provision for his child by his will, and subsequently gives to such child a portion *\*in marriage*—but such [ \*83 ] portion must be equal or greater than the legacy. If, however, the provision in the will is created by a bequest of the residue, there will be no implied ademption, *(f)* nor unless it be *ejusdem generis* with the legacy; *(g)* and if the bequest be in satisfaction of a claim, it is not within the rule applicable to the government of the doctrine of ademptions, which is only applicable in those cases where the parties are the parents, or standing in the eye of the law as such—and where a testator, having given a general power to sell out particular stock, made his will, bequeathing the stock specifically, and afterwards drew bills on the attorneys, and by letter requested them to dispose of a portion of the stock to repay themselves, the bills were paid. And afterwards the testator died, whereupon the attorneys, being ignorant of the testator's death, sold out a portion of the stock and repaid themselves, it was determined *(h)* that neither the direction to sell, nor the sale after the testator's death, adeemed any of the legacy; and advances to children out of an estate other than that from which they derive portions, will not be taken as made in or towards satisfaction of such portions. *(i)*

Equity in general leans against a debt being satisfied by a legacy, but it is in favour of a provision by will being in satisfaction of a portion by contract. So in case of debt, a smaller legacy is not a satisfaction of a larger debt, but *may be* a satisfaction of a portion *pro tanto*—and a gift of the residue is not a satisfaction of a debt, because it is uncertain in amount and may be less than the debt—but as a portion may be satisfied by a smaller legacy, *pro tanto*, there appears no reason why a residue should not be considered a satisfaction of a portion of the legacy. *(k)*

With regard to the gift of a specific chattel by will, which is also subject to the law of ademption, it is not only adeemable in the manner before observed, but by the transfiguration of the particular chattel, as a bequest of wool afterwards converted into cloth; for the law looks upon [ \*84 ] such subsequent conversion as *\*conclusive evidence* that the testator has changed his mind since making the bequest.

*(f)* 2 Atkin, 216.

*(h)* Harrison v. Asher, 12 Jur. 833.

*(i)* 7 Hare, 328.

*(g)* Bro. C. R. 425.

*(k)* Thyne v. Glengall, 12 Jur. 805.

## WITHIN WHAT PERIOD LEGACIES ARE RECOVERABLE.

After the 31st of December, 1833, no action or suit, or other proceeding, can be brought, to recover any money secured upon any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment of the right thereto shall have been given, in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent, and in such case the twenty years are to run from such payment or acknowledgment.<sup>(l)</sup>

## WHEN INTEREST IS PAYABLE ON LEGACIES.

With regard to the payment of interest on legacies, it must be observed, that this no longer depends on the funds being productive or unproductive, although it was formerly otherwise—but now, in the absence of any stipulation in the will to the contrary, a legacy will bear interest only from a year after the testator's death. But simple contract debts of another person, charged by the will of the testator upon his real estate, are legacies which have been held to carry interest from the death of the testator, at four per cent.<sup>(m)</sup> As an illustration of those cases where the funds are productive, may be considered the instances where such of the estate of the testator as is not required for the payment of debts and legacies, is invested at the time of his death upon securities carrying interest; and when such is the case, the tenant for life of the residue is entitled to such interest from the time of the testator's death.<sup>(n)</sup> But a general legatee of "the sum of £— Long Annuities" was considered not to be entitled \*to *dividends* accruing before the expiration of [ \*85 ] a year from the testator's decease.<sup>(o)</sup>

It may be collected from the various authorities, that where a legacy is payable at a particular period, as on a certain day, in the absence of any direction in the will as to the payment of interest, the interest will accrue only from the particular period mentioned—the courts have, however, inclined toward making an exception to this rule where the legatee is a child of the testator, and for the very best of reasons, viz.: that the parent is bound to provide a present maintenance for his child, and the law will not therefore presume that he intended to leave him destitute<sup>(p)</sup>—but a legacy from an uncle to a niece, to be paid at twenty-one or marriage, does not carry interest before the time of payment;<sup>(q)</sup> and a legacy to a grandchild, where no particular time is mentioned, will only carry interest from one year after the testator's death, because it then becomes due;<sup>(r)</sup> but if a father by will gives his natural child a portion,

(l) 3 & 4 Wm. IV., 40.

(m) Sturt v. Westby, 16 Ves. Junr.

(n) Augustain v. Martin, 1 Turn. 232. Hewitt v. Morris, 241.

(o) Collyer v. Ashburner, 2 De C. & S. 404.

(p) 3 Atk. 60.

(q) Crickett v. Dolby, 3 Ves. 10.

(r) 2 Atkinson, 329.

payable at twenty-one, the court will not say it was intended to starve in the meantime, but will allow maintenance.

The master of the rolls, in laying down the above rule in *Cricket v. Dolby*, expressed his opinion that a wife would come under the same exception as a child, to the rule that a legacy does not bear interest till it is payable. It could hardly ever happen that a wife had not some other provision—and that may make a difference in the case of a child. If maintenance is given generally to the child, so that the whole may be exhausted by the maintenance, that shows the testator meant it to carry interest; but if a partial maintenance is given, as if an annual sum less than the interest is given for maintenancee, the child shall have no more.

The distinction that prevailed with regard to the payment of interest on a legacy where it was charged upon land, and where on personalty only, no longer exists.<sup>(s)</sup>

[ \*86 ]      \*WHO ARE INCAPABLE OF TAKING LEGACIES.

To the general rule that all persons are capable of taking legacies there are some exceptions, as in the case of traitors; and by the 25 Car. II., c. 2, and 1 Geo. I., Stat. 2, c. 13, those persons who are required to take the oaths, and otherwise qualify themselves for office, and neglecting or refusing so to do, come within the exception; so the 9 & 10 William III., c. 32, after reciting that many persons had of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the christian religion, greatly tending to the dishonour of Almighty God, and which might prove destructive to the peace and welfare of this kingdom, declares those persons who have once possessed the christian religion, and who afterwards deny the Trinity, or assert there are more gods than one, or shall deny the christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority, and shall be thereupon convicted for the first offence, are incapable to enjoy any office, Ecclesiastical, Civil, or Military—and upon second conviction, they are disabled to sue, prosecute, plead or use any action in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any *legacy* or deed of gift.

It has been before observed that a legacy to an attesting witness is void, Ante, page 19, so also legacies to superstitious uses are void; and the subject of void bequests will be found more particularly treated of in Chapter X.—it may be proper here, however, to notice, that an infant *in ventre sa mere* is not precluded from taking a legacy, but a bequest (“to such child or children, if more than one, a person may happen to be *enceinte* of by me”) was held to preclude a natural child, of which the mother was then pregnant, from taking.<sup>(t)</sup>

(s) 2 Bro. C. R. 47.

(t) *Earle v. Wilson*, 17 Ves. 528.

## \*CHAPTER VII.

[ \*87 ]

## EXECUTORS.

Appointment of Executor.

His duties.

Actions by.

Actions against.

As to the order of Payment of Testator's Debts.

Executor *de son tort*.

Lysley v. Clarke.

Devastavit.

Relief afforded to Executors and Trustees.

Good v. West.

In re Croyden's Trust.

As to the residue of a Testator's effects.

Statute and Table of Distributions.

Meaning of *per capita* and *per stirpes*.

Customs of London and York.

THE person appointed by a testator to carry out the directions of the will is denominated the executor, the appointment of whom is always advisable; but as he may do many acts materially inconveniencing parties beneficially interested under the will, such persons ought only to be nominated to fulfil the office as are above ostentatiously displaying the power they have been invested with, and whose honourable feelings alone will prompt them to endeavour to alleviate rather than create difficulties that in tedious executorships necessarily present themselves; neither should the person appointed be a creditor, for by his appointment his debt becomes extinct.

## HIS DUTIES.

Burying the deceased, proving the will, and taking out administration, demand the executor's first attention: and in the performance of the first duty, as against creditors, and where the assets are insufficient, in the generality of cases he must not exceed in his expenditure the sum of twenty pounds; he must also secure the property, of whatever nature, and his neglect in so doing will make him personally liable to the extent the estate suffers. He should, moreover, act strictly with the intention of \*the testator, as indicated by the terms of the will; and where there is a direction for the executors to call in securities [ \*88 ] not approved of by them, they will not be warranted in continuing those kind of investments which a testator has made, but which a court of equity will not sanction.<sup>(a)</sup> So where executors were ordered to sell canal shares before a certain time, and they sold subsequently, whereby a great loss occurred, they were held personally liable for the loss.<sup>(b)</sup>

Before obtaining probate of the will an executor may effectually do most acts that he may enforce afterwards, because by the very appointment the testator has evinced personal confidence in his nominee, and therefore the interest of an executor arises not from the probate but from

(a) Stiles v. Guy, 19 L. J. 185.

(b) Charlesworth v. Manners, 14 Beav. 319.

the will; and for the same reason it has been held that he may release a debt or assign a term of years before probate.<sup>(c)</sup> He may also collect and secure assets, and it must be observed that due diligence on the part of the executor, in securing assets, is incidental to his acceptance of the office; and it has been accordingly decided, that an executor of a lessee for years is, in the absence of other assets, liable *de bonis propriis* for the rents reserved, to the extent to which he might, by the exercise of reasonable diligence, have derived profit from the premises;<sup>(d)</sup> he may also receive debts, and his receipts will be good, so he may assent to a legacy, present bills or notes for payment, give notices of dishonour, or issue a Fiat in Bankruptcy—but before bringing an action, or filing a bill in equity, probate should be obtained; and if an executor acts before probate, he may be sued as executor, the same as if probate had been granted. It is said that an expected administrator, before obtaining letters of administration can do no act whatever, but it has been considered that he might file a Bill in Chancery, although he may not be able to commence an action at law; and he may also ascertain the value of the property, to be enabled to swear to its not exceeding a certain amount.<sup>(e)</sup>

[ \*89 ] It is advisable, shortly after a testator's decease, for the \*executors to insert an advertisement in the principal newspapers, for all persons standing indebted to the estate of the deceased to pay the respective amounts owing by them, and for persons having claims against the estate to forward the particulars thereof accordingly; this is in all cases advisable and necessary, to enable the executors to judge whether they will be at once justified in paying simple contract creditors, which they will not be justified in doing where it appears there will not be sufficient assets to satisfy debts of a higher degree, as specialty debts, and debts secured by statute.

By the 55 Geo. III., c., 184, sec. 37, after the 31st day of August, 1815, if any person shall take possession of and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such which shall not be ended within four calendar months after the death of the deceased, every person so offending shall forfeit the sum of one hundred pounds, and also a further sum at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the will or letter of administration of the estate and effects of the deceased.

Where probate has been obtained in the absence of a direction to the contrary—the assets should be collected by the executors, for by their out-standing (especially where they consist of book debts) there will not only be a chance of their becoming more difficult to recover, but the es-

(c) Will. Exs.  
(e) Step. Com.

(d) Hopwood v. Whaley, 18 L. J. 43.

tate will be losing interest that might otherwise be accruing on those moneys. When the assets have been collected, it is the duty of the executor to distribute them in payment of the legacies, according to the terms of the will, when the time for distribution has arrived; and if, having ample funds in his hands, and there being no excuse for retaining the money, the executor, instead of paying the legacies and dividing the residue amongst the residuary legatees, retains the [ \*90 ] money in his own hands, he will be charged five per cent. interest on the money so retained; and if he pays the money into his bankers, and mixes it with his own, he will be considered to have derived the same benefit from it as if he had used it in trade.(f)

In all cases, vouchers should be obtained for all moneys paid by the executors, however trifling, and releases from the legatees; but under particular circumstances, sums of money for wages, and for keeping a house in repair, have been allowed, in an administration suit, upon the executor's affidavit.(g)

Executors carrying on the trade or business of a testator, in pursuance of a direction in the will, lay themselves open to make up any deficiency or loss that may arise by carrying on the business, unless it is carried on under the direction of the Court of Chancery, so that it is always advisable to obtain the sanction of the court in the first instance.

In those cases where it is likely executors will experience difficulties in executing the trusts of the will, or there is a likelihood of their being involved in suits by creditors, they shall file a bill to have the estate administered under the direction of the Court of Chancery; but unless there really are grounds for such a step being taken, they will not be justified in seeking the interference of the court, and will be liable to the costs incurred in consequence of their ill-matured procedure; nevertheless, the general rule is in favour of the payment out of the estate by the trustees, in a suit for the administration of their testator's estate, and unless it is made out that the plaintiffs have infringed any of the rules of the court in their conduct, they will be allowed costs.(h) On the other hand, information that they are about being proceeded against by a person claiming the residue, for breaches of trust, will not justify the paying money into court as the share of that person, and consequently the trustees will not be allowed costs.(i) And in taking any step contrary to the \*established practice, whether in paying legacies before they have thoroughly ascertained what debts are outstanding, or otherwise, they should previously obtain the sanction or concurrence of the legatees and next of kin, or of the persons who are in any way interested under the will, they will not be justified in paying legacies until a year after the testator's death, in the absence of direct and positive authority for some particular purpose expressed in the will to the contrary; and if they do so it will be at their own peril, in case debts of a higher degree appear and the assets prove deficient; and where there is a direction for a legacy to be paid within six months

(f) Williams v. Powell, 16 Jur. 393.

(g) Caton v. Rideout, 19 L. J. 408.

(h) Hodgkinson v. Gilbert, 4 L. O. 123.

(i) Re Waring, 16 Jur. 652.

after the testator's decease, the executors may insist upon having a bond of indemnity. It is also proper for the executors, as soon as conveniently may be after the testator's decease, to have an inventory taken, and a valuation made of the testator's personal goods, shares and money invested in stocks, to enable them to prove as to the amount the estate can be sworn under, a distinction being made with regard to those debts that are good and those that are dubious.

The executors are entitled to the body of the deceased, and this notwithstanding there are certain claims against the deceased, made by the gaoler in whose custody he had been, and the court will grant a *mandamus peremptory* in the first instance.<sup>(k)</sup>

#### ACTIONS BY EXECUTORS.

Upon the death of one of several plaintiffs having a joint legal interest in the subject-matter in question, the action survives to the rest, and not to the executors of the deceased plaintiff; and according to the rule *actio personalis moritur cum persona*, which was held to preclude any action being brought by the representatives of a deceased person, in those cases where a trespass had been committed to the testator or his goods, until the 4 Edw. III., c. 7, empower executors to bring actions against persons so offending, and recover damages accordingly. This [ \*92 ] statute, however, not extending the right of action for damages done to \*the real estate of the testator, the 3 & 4 Wm. IV., c. 42, sec. 2, remedied the defect.

Any action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as no such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person, and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.

In every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any other superior

(k) *The Queen v. Fox and others*, 2 Add. & Ellis, Q. B. 246.

court shall otherwise order, be liable to pay costs to the defendant in case of being non-suited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner. So executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as the lessor or landlord might \*have done in his lifetime, and such arrearages may be distrained for after the [\*93] end or termination of the term or lease at will, the same as if the term or lease had not been determined, provided the distress be made within the space of six calendar months after the determination of such term, and during the continuance of the possession of the tenant from whom such arrears became due.

The successor of a deceased rector may bring an action against the executors of the deceased rector, for dilapidations to the parsonage house and chancel; for it hath been determined that an incumbent of a living<sup>(l)</sup> is bound to keep the parsonage house and chancel in good and substantial repair, restoring and rebuilding when necessary according to the original form, without addition or modern improvement. But he is not bound to supply or maintain any thing in the nature of ornament, unless it be necessary to preserve exposed timber—so the custom prevailing in England for rectors to leave their vicarages in repair for their successors extends to Wales.<sup>(m)</sup>

By the 9 and 10 Vic., c. 95, s. 65, any executor or administrator may sue and be sued in any court holden under this act, in like manner as if he were a party in his own right and judgment, and execution shall be such as in the like case would be given or issued in any superior court. But it appears an action under the above section, by a legatee to recover a legacy under £50 will be stayed, and the legatee restrained from proceeding after a decree for the administration of the testator's assets, although the legatee submitted to take a judgment against the executor *de bonis propriis* only, on the allegation of a *devastavit*; for the court will not allow any claimant, after a decree in a suit for administration of assets, to go into the county court and sweep away the assets of the testator, to the prejudice of the other legatees.<sup>(n)</sup>

In suing it must be remembered that all the executors or \*administrators must join in bringing the action,<sup>(o)</sup> and this notwithstanding one may be under age, or have not proved the will, or have been refused before the ordinary.<sup>(p)</sup> But the non-joinder of a co-executor or administrator can only be taken advantage of by plea in abatement after craving oyer of the probate or letters of administration.<sup>(q)</sup> So where an executor brought an action of assumpsit for use and occupation, and upon an account stated and alleged the promises to

(l) *Wise v. Metcalf*, 10 Bar. & C. 299.

(m) *Banbury v. Hewson*, 255 M. D.

(o) *Smith v. Smith*, Yelv. 130.

(q) *Ibid.*

(n) *Ratcliff v. Winch*, 17 Jur. 586.

(p) *Chitty's Practice*, 1073.

have been made to him *as such executor*, and failed to make profert of letters of administration, a demurrer for such failure of profert and misjoinder was allowed.<sup>(r)</sup>

An executor or administrator, before bringing an action, must consider whether the time limited by the statutes of limitations has expired before the death of the testator or intestate, and if it has not, the action may be brought at any time within a year of the testator's death; or if the time limited by the statute has not expired within the year after the death, it may be brought at any time before the expiration of such limited time.<sup>(s)</sup> In *Townsend v. Deacon*, 13 Jur., 366, upon the question arising whether, if a party is abroad at the time of a cause of action accruing to him, and continues to reside abroad until his death, and six years have expired between the accruing of the cause of action and his death, the right of action is gone—the 7th sec. of 21 James I., c. 16, was relied on in argument in support of the proposition that the cause of action survived to the executors—Park, B. was of opinion the above section extended the time for bringing actions to all persons who are infants, femmes coverts, *non compotes mentis*, imprisoned or beyond the seas, and enables all such to sue within the periods previously limited, counting from the time when they attain their age, become discovert, &c. Now it is quite clear that each of these persons, the infant, the feme covert, the person abroad, &c., might have brought his action within those respective times, and their executors represent the person of the testator, who stand in the same position.

[\*95] In this case the court was guided by the principle laid down \*in *Strithorst v. Groeme*, where it was decided, that if a plaintiff is living abroad, who does not come to England within fifty years, he may sue at any time within six years after his return; and if he does not return, his executors may sue after his death.

#### ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

The mere appointment of a person to act as executor is not of itself a sufficient consummation of the office; for the consent of the person nominated to act as such must be evinced by his acceptance of the appointment, either by his consenting to act or by his proving the will; and until he has thus evinced his intention of acting, no action against him can be maintained.

In general, wherever the testator would be liable to an action if living, his executor will be liable, as such, after his death; for it is only reasonable that a person's executors should be called upon to fulfil any undertaking that a testator has agreed to perform; therefore, if a person contracts to erect buildings, or supply goods, the executors must fulfil the engagements, or upon action brought, an equivalent with damages will be recoverable.

On the old maxim, *qui prior est tempore potior est jure*, a creditor who has recovered a judgment against an executor, will, as against creditors

(r) *Sharp v. Sherman*, 12 Ir. L. R. 437.

(s) *Chitty's Practice*, 1073.

of the same class, be entitled to the whole of his demand; for if there are assets, the executor cannot plead *plenè administravit*, although he may confess a judgment after action commenced by a creditor, and thus give a priority over a judgment to be recovered by a creditor in a suit already pending.

Where there are several executors, it is necessary to sue such of them only as have administered.<sup>(t)</sup> And where one of several executors die, the action must be continued against the survivors only, and not against the executors of the deceased executor;<sup>(u)</sup> and if a married woman be executrix with a stranger, the action should be against her and her husband and the stranger.<sup>(v)</sup> In suing executors and administrators, they need not be described as such in the process, and they cannot be holden to bail except \*in those cases where they have promised, in writing, to pay the debt of their testator or intestate, or when they [ \*96 ] have been guilty of a *devastavit*,<sup>(w)</sup> as to which see post.

#### AS TO THE PAYMENT OF A TESTATOR'S DEBTS.

In the payment of the debts of a testator or intestate, the executors or administrators must be governed by the established doctrines that have been laid down for their guidance, and any deviation therefrom will generally make them liable, in case of a deficiency of assets, to satisfy the creditors *de bonis propriis*; and in the first place, as incidental to the possession of the body of the deceased,<sup>(x)</sup> is its decent interment—they will be allowed to retain out of assets that they may have or obtain the expenses of the funeral—but the performance of this pious office must not be abused by any extravagant or unnecessary expense, as such would operate, where there is a deficiency of assets, to the prejudice of the creditors.

He will also be allowed (as he cannot sue himself) any debts that may be due to him from the testator before he pays any other creditor of equal degree, and he may retain his own debt notwithstanding a decree has been made in a suit by other creditors for administration of assets equally, and notwithstanding assets out of which he seeks to retain his debt came to his hands after decree, and even if the debts be barred by the statute of limitations.<sup>(y)</sup> So where the payee and holder of a promissory note appoints the maker his executor the debt is discharged, and it has been held no action can be maintained on the note, even by a person to whom the executor had indorsed it.<sup>(z)</sup> Lord Tenterden, in arriving at the above conclusion, appeared to have been guided by the expression (used in the cases of *Wankford v. Wankford*, and *Cheetham v. Ward*), “that the debt is discharged.” It is considered to have been paid by the executor to himself, and becomes assets in his hands. Upon this supposition the rule in \*equity depends, which makes the executor [ \*97 ] accountable for the amount of his debt as assets.

If a testator is indebted to a woman before her marriage, and her hus-

(t) 2 Will. Exors.

(w) Chitty's Practice, 1076.

(y) St. Comm.

(u) 1 Roll. Ab.

(v) Com. Dig.

(x) See page 91.

(z) *Freakley v. Fox*, 9 Bar. & Cress. 131.

band is appointed executor, he will be entitled to retain for the amount owing. And if the husband is indebted to a testator, and his wife is appointed executrix, it is a release or extinguishment of the debt.

After the funeral expenses, the executor may next pay the expenses of proving the will or taking out administration; the next debts that claim his attention, and which he must discharge, are those that are due to the crown on record or specialty.(a) The king, by virtue of his prerogative, is always to be preferred before creditors; for where the title of the king and the title of a common subject concur, the king's title shall be preferred,(b) *quando jus Domini Regis et subditi concurrunt jus Regis præferri debet*. The debts due to the crown to be entitled to this privilege must be such as are matter of record or specialty,(c) in which case the process to recover them is by writ of extent, returnable in the Court of Exchequer, by which the sheriff is directed to inquire, by the oaths of lawful men, what lands and tenements the debtor had at the time the debt was contracted.(d)

In the third order of payment come those debts that are by particular statutes to be preferred to all others, as money upon poors rates; and by the 13 & 14 Vict., c. 115, if any person appointed to any office in any Friendly Society, or branch thereof, established under this act, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any moneys or effects belonging thereto, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or have any execution or attachment, or other process issued, or action or diligence raised against his lands, goods, chattels or effects, or property or estate, heritable or moveable, or make any assignment, disposition, assignation or other conveyance thereof, for the benefit of his creditors, his heirs, executors, [ \*98 ] administrators or assigns, or other \*persons having legal right, the sheriff, or other officer executing such process, or the party using such action or diligence, shall, within forty days after demand made in writing by the order of any such society or branch, or of not less than three of the committee of management assembled at any meeting thereof, deliver and pay over all moneys and other things belonging to such society or branch, to such person as such society or committee shall appoint; and shall pay out of the estates, assets or effects, heritable or moveable, of such person, all sums of money remaining due which such person received by virtue of his said office or employment, before *any other of his debts are paid or satisfied*, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence, and all such assets, lands, goods, chattels, property, estates and effects, shall be bound to the payment and discharge thereof accordingly.

Fourthly, must be paid by the executor, those debts that are of record, as judgments(e) (docketed according to the 4 & 5 Wm. & Mary, and

(a) 1 And. 129.

(b) Co. Litt. 30 b.

(c) Bac. Abr.

(d) 2 Inst. 19.

(e) 2 Bla. Com.

the 1 Vic., c. 110,) statutes and recognizances—by the last-named act, sec. 27, every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of the act in cases of judgments then entered up and not carrying interest until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment—so also all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy whereby any sum of money, or any costs, charges or expenses shall be payable to any person, are to have the effect of judgments in the superior Courts of Common Law, and the persons to whom any such moneys or costs, charges or expenses shall be payable, are to be deemed judgment creditors; and all powers [\*99] \*given to the Judges of the Superior Courts of Common Law, with respect to matters depending in the same courts, may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy, and the remedies thereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such orders or rules respectively directed to be paid. By the 27th section, the court for the relief of insolvent debtors is declared to be a Court of Record.

The judgment creditor who first sues out a *scire facias* will have priority, but before such writ is sued out the executor has it in his election, where there are two judgment creditors, to pay which of them he pleases first; and if each sue out a *scire facias* on his judgment the executor may confess either, and that notwithstanding the *scire facias* was brought by one creditor before the other.(f)

In the fifth order of payment comes those debts that are due on specialty, under which class it has been decided that rent must be considered, although specialty debts generally import those due on instruments under seal—consequently an executor must discharge a debt for rent before a simple contract one. An executor should be careful in ascertaining the debts being *bonâ fide* before discharging them; for a voluntary bond, although under seal, must not be paid prior to a *bonâ fide* simple contract debt.(g)

The executor should be guided in the proof he requires of the debt by the circumstances attendant upon the rendering of the account, in the case of a simple contract debt; for should it differ in amount from a prior account rendered to the testator, there will be a ground for him requiring it being verified as being correct, but those due under seal are of themselves *prima facie* a sufficient warranty of their being due, and an executor would, it is apprehended, be justified in paying such, although it afterwards appeared a forgery had been committed.

\*It must be observed, that debts due on mortgage come under the denomination of specialty debts, and this although there be [\*100]

(f) Tol. Exors. 264.

(g) Ibid.

no covenant for the payment of the mortgage money, and the personal estate is the primary fund for its payment.<sup>(h)</sup>

The next and last debts the executor must pay, are those that come under the denomination of simple contract debts—they include all those that are not under seal, and have not been previously described. In this class, those moncys that are due for wages to servants, whether of husbandry or otherwise, claim priority.

Where there are contingent debts, the executor should retain in his hands sufficient to satisfy them when they become due. But in an action by an executrix of an assignor of a lease, against the executrix of the assignee, upon a covenant by the assignee to perform certain covenants in the lease, and indemnify the assignor for the breach thereof, defendant pleaded *plenè administravit*, and proved that all the assets, including the consideration money for a sale of the lease, had, prior to the breach of covenant, been applied in satisfaction of simple contract debts—this defence was held good, for that the executor was not bound to retain the proceeds of such sale to guard against any future breach of covenant, although some of the breaches were by nonpayment of rent.<sup>(i)</sup>

After the residuary accounts have been passed at the Stamp Office by the executor, he will be entitled to releases from the legatees, and bonds of indemnity in certain cases; and where there are several legatees, it is advisable to obtain a general deed of release, which may afterwards be pleaded as an estoppel to any action for any thing therein expressed to have been released; where, however, the legacies are under twenty pounds, a common receipt, if properly worded, will be a sufficient release to the executor.

[\*101]

\*EXECUTOR DE SON TORT.

Those persons who officiously interfere and meddle with the administration of a deceased's estate or effects, without having any legal authority or warranty for their so acting, become executors *de son tort*; and where persons are foolish enough to make themselves such, the law immediately invests them with the usual liabilities of a legally constituted executor, and actions may be commenced against them accordingly, as they are looked upon as executors generally; for it is only fair to presume that they, by so acting, are deriving some secret advantage through the death of the testator. An executor *de son tort* of an executor, by taking upon himself the office of an executor, thereby incurs all the liability to which he would be subject if he were the rightful executor, and may therefore be sued upon a bond made by the original testator.<sup>(k)</sup> So the act of an executor *de son tort* is good against the true representative of the deceased only where it is lawful, and such an act as the true representative was bound to perform in the due course of administration,<sup>(l)</sup> but he is chargeable with the debts of the deceased so far as assets come to his hands;<sup>(m)</sup> and it has been determined that a person

(h) Pow. on Mortgages.

(i) Collins v. Crouch, 13 Q. B. 542.

(k) Meyrick v. Anderson, M. Dig. 1850, Q. B.

(l) Buckley v. Barber, 15 Jur. 63.

(m) Dyer, 166.

acting in the management of assets, although there is an executor who afterwards proves the will, is liable as an executor *de son tort*, unless it clearly is established that he was merely an agent.<sup>(n)</sup> In *Lysely v. Clarke*, 18 L. T. 141, it was settled that a person receiving money from another who had constituted himself an executor *de son tort*, and applied a portion of it towards the funeral expenses of the deceased, and a portion to himself in liquidation of a debt owing to himself by the deceased, and retained the balance, did not, by such acts, become an executor *de son tort*.

There are, however, certain acts which the law countenances a person undertaking, without making himself an executor *de son \*tort*— [\*102] such are burying the body of the deceased, and locking up the goods to prevent their being carried off or injured.<sup>(o)</sup>

Such services are looked upon as merely acts of necessity, duty, or humanity, which are happily favoured, countenanced and applauded, in a christian country, boasting of its magnanimity and acknowledged for its supremacy.

#### DEVASTAVIT.

The word imports a wasting of property by an executor or administrator, when applied in reference to the estate of a testator, which may be by the misapplication of the assets, either wilfully or by negligence, by the former method; by putting the estate to unnecessary and unwarranted expense, by squandering the assets, and by paying simple contract debts in preference to those of a higher degree when he had notice of the latter, or had omitted to take the necessary precautions of ascertaining they were such, and it turns out there is a deficiency of assets; by negligence, as failing to take advantage of those rules that have been laid down for his guidance in making the most of the testator's estate—when, therefore, a devastavit has been committed, the executor becomes personally responsible for the loss the estate has sustained by his conduct. And it has been accordingly laid down, that as incidental to the proving of the will is the getting in of the testator's estate, an executor, by remaining passive, and allowing a misapplication by his co-executor of the assets, will, through his negligence, be liable to make good the deficiency occasioned by his co-executors.<sup>(p)</sup>

#### RELIEF AND INDEMNITY TO EXECUTORS AND TRUSTEES.

For relieving executors, trustees and administrators from the responsibility of administering trust funds in those cases where difficulties arise, and they are desirous of being relieved, they are empowered, under the 10 and 11 Vic., c. 96, upon filing an affidavit shortly describing the instrument creating the trust, \*according to the best of their [\*103] knowledge and belief, to pay the same, with the privity of the accountant-general of the Court of Chancery, into the Bank of England,

(n) *Kelly v. Murphy*, 12 Ir. Eq. Rep. 614.

(o) *Bl. Com.*

(p) *Stiles v. Guy*, 14 L. J. 305.

to the account of such accountant-general, in the matter of the particular trust (describing the same by the names of the parties as accurately as may be, for the purpose of distinguishing it,) in trust to attend the orders of the court; and where there are annuities or stocks standing in the executor's or trustee's name in the Bank of England, or the East India Company, or South Sea Company, or any Government or Parliamentary securities, or in the name of the deceased person of whom they are the personal representatives, upon any trust, they, or the major part of them, may transfer or deposit such stocks or securities into the name of the said accountant-general, with his privity of the master of the particular trust, in trust to attend the orders of the said court.

On such moneys so paid in, the court may from time to time make such orders as it may deem advisable, and for the administration of such trusts generally, upon a petition, to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill by the party as to the court, shall seem competent, and service of such petition shall be made upon such person as the court shall direct; and every order made upon such petition is to have the same authority and effect, and be enforced and subject to rehearing and appeal, in the same manner as if it had been made in a suit regularly instituted in the court; but if it appears that any trust fund cannot be safely distributed without the institution of one or more suits, the Lord Chancellor or Master of the Rolls may order the same to be instituted.

Notwithstanding the relief thus afforded, many difficulties arose as to the transfer of securities vested in executors and trustees, to remedy which was introduced the 12 & 13 Vic., c. 74, for

#### THE FURTHER RELIEF OF TRUSTEES.

Where, upon any petition presented as before pointed out, it appears to the judge of the court of chancery, before whom such petition is heard, that any moneys, annuities, stocks, funds, \*or securities, [\*104] are vested in any persons, as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of 10 & 11 Vic., c. 96, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the accountant-general of the court of chancery, but that for any reason the concurrence of the others cannot be had, such judge may order such transfer to be made by the major part of such persons without the concurrence of the others; and where such moneys are deposited with any depositary, the judge is empowered to make an order for the payment or delivery of the same moneys and securities to the major part of such trustees, executors, or administrators, or other persons, for the purpose of being paid or delivered to the accountant-general, and the transfers so made will be valid as if they had been made on the authority of all the persons entitled to the same, and will indemnify all persons acting in pursuance of the order.

Where trustees have paid any portion of their trust fund into court under the provisions of the above, the original jurisdiction of the court by bill is gone as to the portions so paid in, and the remedy of the *cestui*

*que trust* can only be prosecuted under those provisions.(g) So it has been determined that the trustees might avail themselves of the advantages of the acts above alluded to, and pay the amount into court, where the question arose as to whether the next of kin of the testator's wife were or were not entitled to a sum of money bequeathed to them as a class, or whether only such of the class were entitled as were living at the death of the testator.(r) So a letter from a person abroad, authorising the transfer of shares to a creditor, and to attend to his instructions with reference to the transfer thereof, was considered to be a constructive trust, and a case proper for a petition being presented under the trustee relief acts, for completing the transfer.(s)

Where a trustee has paid a trust fund into court under the relief acts, and cannot be found, and after leave has been \*obtained to serve the trustees at the address given by him, the party petitioning [\*105] for payment of the money out of court, upon an affidavit stating that diligent inquiry has been made for the trustee but without success, and that the trustee has left a note for the petitioner at the house of a relation, requiring payment of a certain sum before he would give any assistance to the petitioner, the court will make the necessary order.(t)

Where the fund paid into court was secured for the benefit of all parties entitled, the costs of an application for payment to the tenant for life of the dividends, was ordered to be paid out of the corpus of the fund;(u) this, however, was otherwise determined in a similar case coming before V. C. Kindersley, who decided that the costs of the application must come out of the income, and not out of the corpus. And observed, it was to be regretted that there was a difference of practice in these cases in the different courts, but that until it was settled it was his (the V. Chancellor's) intention to do what in his opinion was fair and reasonable, and that he did not think fit just that the remaindermen should bear the costs of the applications of the tenants for life.(v)

In *re Croyden's Trust*, 19 L. J., 172, it was laid down that trustees need take no trouble in ascertaining the validity of claims upon the trust fund, and to discharge themselves from such responsibility they may pay the money into court under the relief acts.

#### THE RESIDUE.

When all the debts are paid and the legacies are discharged, the surplus is called the residue (which, when there is one appointed, is paid to the residuary legatee).

It was formerly held, that where there was no residuary legatee the executor was entitled to the residue, but this law is now entirely altered; for by the 1 Wm. IV., c. 40, s. 1, executors are to be deemed trustees for persons entitled to any residue under the statute of distributions,

(g) *Good v. West*, 15 Jur. 1025.

(s) *In re Major Angelo*, 16 Jur. 831.

(t) *Ex parte Bangham*, 16 Jur. 325.

(v) *In re Bangley's Trust*, 11 Jur. 682.

(r) *In re Harris' Will*, 15 Jur. 121.

(u) *Re Butler's Trust*, *ibid*.

[\*106] unless otherwise directed by the \*Will—but this is not to affect the rights of executors where there is no person entitled to the residue.

When, therefore, there is no direction in the will that the executor is to retain the residue, he must be considered with regard to the residue as a mere trustee or officer for its due distribution. The distribution of the residue by the executor should be made after one year from the testator's death, and in accordance with the provisions of the 29 Car. II., c. 30, which enacts that the surplusage of intestate's estates (except of *femes covert*, which are left as at common law by c. 3, s. 25 of the St. of 29 Car. II.) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner:—One-third shall go to the widow of the intestate and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants. If there are no children or legal representatives subsisting, then a moiety shall go to the widow and a moiety to the next of kindred, in equal degree, and their representatives—if no widow, the whole shall go to the children—if neither widow nor children, the whole shall be distributed among the next of kin, in equal degree, and their representatives; but no representatives are admitted among collaterals further than the children of the intestate's brothers or sisters.

By this statute the mother as well as the father succeeded to all the personal effects of their children, who died intestate and without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased—and the law still remains the same with regard to the father.

[\*107] \*The following Table is illustrative of the

#### STATUTE OF DISTRIBUTIONS :—

<i>If the intestate dies, leaving</i>	<i>His personal representatives take as follows :</i>
Wife and child, or children.....	One-third to wife, rest to child or children;* and if the children are dead, then to their representatives (that is, their lineal descendants), except such child or children, not heirs at law, who had estate by settlement of intestate in his lifetime, equal to other shares.
Wife only.....	Half to wife, rest to next of kin in equal degrees to intestate, or their legal representatives.
No wife or child.....	All to next of kin and to their legal representatives.
Child, children, or representatives of them.....	All to him, her, or them.
Children by two wives.....	Equally to all.
If no child, children, or representatives of them.....	All to next of kin in equal degree to intestate.

\* Whether male or female, or posthumous, and whether by the same or different wives. *Brown v. Farndell*, Carth. 51; 2 Atkin, 115; 1 Ves. 156.

*If the intestate dies, leaving**His personal representatives take as follows:*

Child and grandchild.....	Half to child, half to grandchild, who takes by representation.
Husband.....	Whole to him.
Father, and brother or sister.....	Whole to father.
Mother, and brother or sister.....	Whole to them equally.
Wife, mother, brother, sisters, and nieces.....	Half to wife, residue to mother, brother, sisters, and nieces.
Wife, mother, nephews, and nieces.....	Two-fourths to wife, one-fourth to mother, and other fourth to nephews and nieces.
Wife, brothers or sisters, and mother ...	Half to wife (under Stat. of Car. II.), half to brothers or sisters, and mother.
Mother only.....	The whole (it being then out of the Statute of 1 Jac. II., c. 17).
Wife and mother.....	Half to wife, half to mother.
Brother or sister of whole blood, and brother or sister of half blood.....	Equally to both.
*Posthumous brother or sister, and mother.....	Equally to both. [*108]
Posthumous brother or sister, and brother or sister born in lifetime of father.	Equally to both.
Father's father, and mother's mother ...	Equally to both.
Uncle or aunt's children, and brother or sister's grandchildren.....	Equally to both.
Grandmother, uncle, or aunt.....	All to grandmother.
Two aunts, nephew and niece.....	Equally to all.
Uncle and deceased uncle's child.....	All to uncle.
Uncle, by mother's side, and deceased uncle or aunt's child.....	All to uncle.
Nephew by brother, and nephew by half-sister.....	Equally <i>per capita</i> .
Brother or sister's nephew or nieces....	Where nephews and nieces taking <i>per stirpes</i> , and not <i>per capita</i> .
Nephew by deceased brother, and nephews and nieces by deceased sister..	Each in equal shares <i>per capita</i> , and not <i>per stirpes</i> .
Brother and grandfather.....	Whole to brother.
Brother's grandson, and brother or sister's daughter.....	To daughter.
Brother and two aunts.....	To brother.
Brother and wife.....	Half to brother, half to wife.
Mother and brother.....	Equally.*
Wife, mother, and children of a deceased brother (or sister).....	Half to wife, a fourth to mother, and a fourth <i>per stirpes</i> to deceased brother or sister's children.†
Wife, brother or sister, and children of a deceased brother or sister .....	Half to wife, a fourth to brother or sister <i>per capita</i> , one-fourth to deceased brother or sister's children, <i>per stirpes</i> .
Brother or sister, and children of a deceased brother or sister .....	Half to brother or sister <i>per capita</i> , half to children of deceased brother or sister, <i>per stirpes</i> .
Grandfather and brother.....	All to brother.‡

\* By 1 Jac. II., c. 17, s. 7—If, after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister and the representatives of them shall have an equal share with her. [\*109]

\* Keilway v. Keilway, 2 P. Wms. 344. 1 Stra. 710.

† Stanley v. Stanley, 1 Atk. 458.

‡ Evelyn v. Evelyn, 3 Atk. 762.

By another part of the statute of distribution, which provides that no child of the intestate except his heir at law, on whom he settled, in his lifetime, any estate in lands or pecuniary portion equal to the distributive shares of the other children, shall participate with them of the surplus; but if the estate so given him by way of advancement be not equivalent to their shares, then that such part of the surplus as will make it so shall be allotted to him.

The statute does not take away any property that has been given or bequeathed to him, however unequal it may have been, or how much soever it may exceed the residue, and of course he may keep it all; but if he thinks that, by bringing his share into the general mass, and then taking his share out of the whole, it will be to his advantage, he may do so—and this throwing his share into the general mass is termed bringing it into hotchpot.<sup>(w)</sup>

#### DIVISION PER CAPITA AND PER STIRPES.

The doctrines and limits of representation, laid down in the statutes of distribution, says Mr. Justice Blackstone, seem to have been principally borrowed from the civil law, whereby it sometimes happens that personal estates are divided *per capita* and sometimes *per stirpes*, whereas the common law knows no other rule of succession but that of *stirpes only*. They are divided *per capita* to every man an equal share, when all the claimants claim in their own rights as in equal degree of kindred, and not *jure representationis* in the right of another person. As if the next of kin be the intestate's three brothers, A., B., C., here his effects are divided into three equal portions, and distributed *per capita* one to each; but if one of these brothers, A., had been dead, leaving three children—and another, B., leaving two—then the distribution must have been *per stirpes*, [\*110] viz.: one-third to A.'s three children, another third to B.'s two children, and the remaining third to C., the surviving brother; yet if C. had also been dead without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own right *per capita*, viz.: each of them one-fifth part.

#### CUSTOMS OF LONDON AND YORK.

The statute of distributions expressly reserves the customs of the City of London, also the province of York, and of all other places having peculiar customs of distributing intestate's effects.

In the City of London and province of York, the effects of the intestate, after payment of debts, are divided according to the ancient universal doctrine of the *pars rationabilis*;<sup>(x)</sup> but by the 11 Geo. I., c. 18, sec. 17, all persons who shall at any time from and after the first day of June, 1725, be made or become free of the City of London, and also all persons who are free of the said City, and on the said first day of June, 1725, are unmarried, and have no issue by any former marriage, are empowered to devise, will, and dispose of his and their personal estates, to

(w) Bla. Com.

(x) 2 B. Com.

such persons and for such uses as he or they shall think proper, any custom or usage to the contrary notwithstanding; and the 4 & 5 Wm. and Mary, c. 2, explained by the 2 & 3 Ann, c. 5, and the 7 & 8 Wm. III., c. 38, empower persons within the province of York and Wales, where the custom above referred to existed, to dispose of all their personal estates, by will; and the claims of the widow and children, in opposition to such bequests, are void.

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## \*CHAPTER VIII.

[\*111]

### ADMINISTRATION.

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When deceased dies wholly intestate.	Administration <i>durante absentia</i> .
When Administrator's claim accrues.	" <i>pendente lite</i> .
Mode of taking out Administration.	" <i>ad colligenda bona</i> .
Administration Bond.	" to a Creditor.
Special Administration.	" to the Crown.
Administration <i>durante minoritate</i> .	" <i>de bonis non</i> .

ADMINISTRATION is the committal of the goods of any person deceased by an act of the Ordinary, evidenced by an official instrument under seal, and is obtainable where the deceased dies wholly intestate, without making a will or appointing executors.

There are a variety of circumstances under which administration will be granted, notwithstanding the deceased has not died wholly intestate, which will be briefly alluded to.

But, first, where the deceased dies wholly intestate, letters of administration will be granted by the Ordinary to such person as the statutes of 31 Edward the Third and 21 Henry the Eighth direct.<sup>(a)</sup> According to the former statute, to the next and most lawful friends of the intestate—to the latter, to the widow and next of kin, or both or either of them. So, therefore, administration of the effects of a deceased wife will be granted to the husband or his representative—and of the husband's effects to the widow or next of kin, but it is optional for him to grant it to either or both. Those kindred are to be preferred that are nearest in degree to the testator, but of persons in equal degree the Ordinary may take which he pleases.

The nearest or propinquity of degree is to be reckoned according to the computation of civilians, and not of the canonists, which the law of England adopts in the descent of real estate, \*because in the civil computation the intestate himself is the *terminus a quo* the [\*112] several degrees are numbered, and not the common ancestor according to the rule of the canonist; and therefore, in the first place, the children or (on failure of children) the parents of the deceased are entitled to admi-

(a) 2 B. C.

nistration—both which are in the first degree—but with us the children are allowed the preference, then follow brothers, grandfathers, uncles or nephews (and the females of each class respectively,) and lastly cousins.(b)

The half blood is admitted to the administration as well as the whole, consequently the brother of the half blood will exclude the uncle of the whole blood.

A sister, as next of kin, is entitled to administration with the will annexed in preference to the husband ;(c) and where administration has been granted to a sister, a married woman, pending a caveat entered by the brother, it was adjudged that the administration should not be revoked at his suit.(d)

Where formerly a person died intestate, the king, as *parens patriæ* and general trustee of the kingdom, was entitled to seize upon the intestate's goods :(e) the delegation of this power subsequently took place in favour of the professed spiritual men, and thus it is that at the present period it is vested in the Ordinary, to whom also, as incidental to the disposition of intestate's effects, has been committed the right of granting probate to wills,(f) and whose title is complete at the death of the party in the diocese.

Letters of administration must always be taken out in the court of the ordinary within whose jurisdiction the assets are.(g)

[\*113]

\*WHEN ADMINISTRATOR'S CLAIM ACCRUES.

The administrator's claim accrues from the death of the deceased—for by the 3 and 4 Wm. IV., c. 27, s. 6, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of letters of administration ; but where any person shall be in possession or in receipt of the profits of any land, or of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person

(b) 2 Bla. Com.

(c) *Brenchley v. Lynn*, 16 Jur. 292.

(d) *Offley v. Best*, 1 Lee, 186, and Su. 11, Vin. Abs.

(e) Bla. Com.

(f) *In re Spencer*, 16 Jur. 234.

(g) If the Trustee of a term die leaving personal effects, all of which, including the land in the term, are within the jurisdiction of the same court, his will ought to be proved, or administration ought to be taken out in that court. If he die, leaving personal effects in one Diocese or Peculiar, the land in the term being in another Diocese or Peculiar within the same province, either Canterbury or York, his will ought to be proved, or letters of administration ought to be taken out in the Prerogative Court of that province, if he die leaving personal effects within one of the two provinces, and the land in the term be within the other province, for the purpose of administering his assets, exclusive of the term, the will must be proved or the letters of administration must be taken out, either in the Prerogative Court of that province, or in an inferior court, as circumstances may require, but, on account of the term, the will must also be proved, or administration must also be taken out either in the Prerogative Court of the other province, or, if he had no other assets within that province besides the term in the Inferior Court, of the Ordinary having jurisdiction over the place where the land in the term is situated. See Sug. 3 V. & P. 14.

through whom he claims to make an entry or distress, or bring an action to recover, such land or rent shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined, but no mortgagor or *cestui que trust* shall be deemed to be a tenant at will to his mortgagee or trustee.

The relation back of letters of administration exists only for the benefit of the estate, by enabling the administrator to recover against those who interfere with it, and so prevent its being despoiled.<sup>(h)</sup>

Where, however, a person takes out letters of administration under a will by which he has been appointed executor, and has notice of a subsequent will, but nevertheless sells the goods of the testator, the rightful executor, in an action of trover, will be entitled to recover the full value of the goods sold, and the executor named in the first will, will not be entitled (in \*mitigation of damages) to show that he has administered the assets to that amount.<sup>(i)</sup> [\*114]

#### MODE OF OBTAINING LETTERS OF ADMINISTRATION.

On applying to take out letters of administration (which will not be issued in the absence of special cause being shown, until fourteen days after the death of the intestate)<sup>(k)</sup> it is necessary to take oath that the deponent verily believes the deceased to have made no will; that he will truly administer the goods, by paying the debts as far as the assets will allow; that he will make a true inventory of the goods, chattels, and credits, and exhibit the same into the proper office of the court when directed, and otherwise render a just account when required.

The Statute 21 Henry VIII., c. 5, s. 3, directs the ordinary to grant administration, taking surety of him or them to whom shall be made such commission; and pursuant to the 22 and 23 Car. II., c. 10, the person to whom administration is granted enters into bond with two or more sureties, conditioned to make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the deceased, which have or shall have come to his hands, possession or knowledge, or in the hands and possession of any other person or persons for him, and the same to exhibit, or cause to be exhibited into the registry of the court, at or before a particular day; and the same goods, chattels and credits, and other and all other the goods, chattels and credits of the deceased at the time of his death, which at any time after shall come to his hands or possession, or into the hands and possession of any other person or persons for him, well and truly administer according to law, and further make or cause to be made a true and just account of his said administration, before a particular day to be named by the court. And for delivering all the rest and residue of the said goods, chattels, and credits, which shall be found remaining upon the said administrator's account, the same being examined and allowed of by the judge or judges

<sup>(h)</sup> Per Park, B.; *Morgan v. Thomas*.

<sup>(i)</sup> *Wolley v. Clark*, 5 Barn. & Ald. 744.

<sup>(k)</sup> 4 Burn. E. L.

[\*115] for the time being of the said court, shall \*deliver and pay unto such person or person respectively, as the said judge or judges by his or their decree or sentence shall appoint.

And if it shall appear that any last will and testament was made by the deceased, and the executor or executors therein named exhibit the same to the said court, making request to have it allowed and approved accordingly—and if the obligor, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court—the bond must be sued upon in a court of law, and the ecclesiastical court will not deviate from this established rule, or order the bond to be attended with, for the purpose of being sued upon in a court of equity,<sup>(l)</sup> nor will the court pronounce an opinion as to whether the bond has been forfeited,<sup>(m)</sup> but it will direct the bond to be attended with upon sufficient cause being shown; and although the bonds, in practice, are looked upon as mere matters of form, the courts will not countenance the nomination of sureties who are not responsible parties.<sup>(n)</sup>

#### SPECIAL ADMINISTRATION.

When the chain of representation has been twice severed by the death of administrators, with the will annexed, and the estate remains unadministered, the court will grant administration with the will annexed to the next of kin of the residuary legatee named in the will, where he dies a lunatic.<sup>(o)</sup> So where a married woman makes a will in pursuance of a power, and disposes of the fund over which she has control away from her husband, but appoints no executor, and the will refers to no other property, administration will be decreed to the husband.<sup>(p)</sup>

Partial intestacy occurring by the nonappointment of an executor, is a case in which administration will be granted with the will annexed.

[\*116] So also, if the executor is incapacitated from \*fulfilling the office, it is the same as if he had not been appointed, and administration will be granted accordingly; and a bequest by a person of the remainder of her money (after the payment of her debts, funeral expenses, and legacies to her three nieces and nephew) are words sufficient to entitle one of the nieces to administration with the will annexed, as residuary legatee.<sup>(q)</sup>

The misconduct of a testator's wife, in contracting a second marriage during her husband's lifetime, where infants are entitled to participate in the fund, is a sufficient ground to warrant the court in refusing to grant her administration, and in granting it to the brother.<sup>(r)</sup>

When three children of a testator take vested interests in the residue, subject to the life estate of their surviving parent, and two die, and the only child surviving the mother renounces, the court will grant adminis-

(l) Hay v. Willoughby, 14 Jur. 750.

(m) Young v. Skelton, 3 Hagg. 789.

(n) 3 Add. 78.

(o) In re goods R. Wood, 14 Jur. 558. 4 Hagg. 387.

(p) In re goods Thornton, 13 Jur. 1084.

(q) In re goods Hand, 13 Jur. 663.

(r) Chapel v. Chapel, 3 Curt. 431.

tration with the will annexed of the testator to one of the children of the deceased's daughter.

Administration with the will annexed will be granted in those cases where no executor has been appointed, or where through his incompetency, or death before probate, his appointment becomes inoperative, or he refuses to act, or where he dies when he has only partly administered, or where the estate remains unadministered through the chain of representation being severed by the death of the administrators, and in those cases where the executors are precluded from executing the office, or decline to interfere therein.

A limited administration will also be granted where the will is lost, there being nothing to raise the supposition that it has been intentionally suppressed.<sup>(s)</sup>

An administrator *de bonis non* is merely an administration of the goods of the deceased as are left unadministered by the former executor or administrator, and by such grant the administrator *de bonis non* becomes the only personal representative of the person originally deceased.

\*ADMINISTRATION DURANTE MINORITATE. [\*117]

A distinction exists in the Spiritual Court between an infant and a minor—the former is so denominated if under seven years of age, the latter from seven to twenty-one. The ordinary *ex officio* assigns a guardian to the infant. The minor himself nominates a guardian, and the guardianship in either case is granted to the next of kin of the child, unless sufficient objection to him be shown, and administration is committed to such appointed for the benefit of the infant or minor.<sup>(t)</sup>

In those cases where administration is granted during the minority of two persons, it ceases when one of them comes of age, and Administration will be granted to him.<sup>(u)</sup>

Where a person under age is entitled to administration in the case of an intestacy, administration will be granted *durante minoritate* to another for him, and the Ecclesiastical Judge may exercise a discretionary power in nominating whom he pleases,<sup>(v)</sup> but such administration is generally granted to the next of kin of the infant.—In Rich v. Chamberlayne, where the child was between the ages of seven and twenty-one, it was determined that he might nominate a guardian himself, but the court will reject such nominee where he is an improper person.

The 38 Geo. III., c. 87, s. 6, recites that inconveniences arose from granting probate to infants under the age of twenty, and enacts that where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.

(s) 2 Hagg. N. R. 555.

(u) Welby v. Poulton, Mosely, 99.

(t) Toller's Exors. 99.

(v) West v. Wilby, 3 Phill. 379.

## ADMINISTRATION DURANTE ABSENTIA.

By the 38 Geo. III., c. 87, after reciting that the existing law was [\*118] insufficient to enforce a speedy distribution of the assets of deceased persons, where the executor to whom probate had been granted was out of the jurisdiction of the courts of law and equity, declares, that at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate has been granted are residing out of the jurisdiction as aforesaid, it shall be lawful for the Ecclesiastical Court, which had granted probate of the will upon the application of any creditor, next of kin, or legatee, grounded on an affidavit, to grant administration.

The affidavit above alluded to should state that there is due, and to the person making the application, upon bond or simple contract, or upon account unsettled, as the case may be (in which latter case he swears to the best of his belief only,) from the estate and effects of the deceased the amount due, or he believes to be due, as the case may be, and that (the person named executor) the only executor capable of acting, and to whom probate hath been granted, has departed this kingdom, and is out of the jurisdiction of her majesty's courts of law and equity, and that the deponent is desirous of exhibiting a bill in equity, for the purpose of being paid his demand out of the assets of the testator.

And the Court of Equity, in which the suit is depending, may appoint any person or persons to collect in any outstanding debts or effects due to such estate, and give discharges for the same, such persons giving security in the usual manner to account for the same; and it has been determined that the provisions of this act are applicable where an executor is out of the jurisdiction of the courts here, although not out of the realm; <sup>(w)</sup> and where such limited administration has been granted, it is determined upon the person returning; <sup>(x)</sup> and it may be collected from the authorities, that for the benefit of a deceased's estate, the court will exercise its inherent power of granting administration to some third person until the executor presents himself within the jurisdiction of our courts.

[\*119]

## \*ADMINISTRATION PENDENTE LITE.

When there is a suit pending, whether it is concerning the executorship or the right to administration, the Ecclesiastical Court may grant administration *pendente lite*, <sup>(y)</sup> but neither of the parties to the suit will be selected. <sup>(z)</sup> An administrator *pendente lite* is merely an officer of the court, and holds the property only until the suit is terminated, when he will have to pay over all he has received to the persons entitled to it. <sup>(a)</sup>

<sup>(w)</sup> 2 Add. 504.

<sup>(y)</sup> Maskeline v. Harrison, 2 Lee.

<sup>(a)</sup> In goods of D. S. Graves, 1 Hall, 315, and see Waddilove, E. D.

<sup>(x)</sup> 1 Will. Exors.

<sup>(z)</sup> Young v. Brown, 1 Hagg.

It appears questionable whether the fact of an administrator *ad litem* being made defendant in an administration suit, is sufficient to satisfy the court that there are no personal assets, and to warrant a decree being made against the real estate without the usual preliminary accounts of the personal estate; but if the plaintiffs in the suit could obtain general administration, the personal estate would not be sufficiently represented by an administration *ad litem*.(b)

## ADMINISTRATION AD COLLIGENDA BONA.

Where a person dies in this country, and leaves the instrument disposing of his effects in another, the court will not allow the estate of the deceased to be prejudiced thereby, but will grant administration to a person to collect the assets and protect the property until the instrument is forwarded.(c) So likewise the court will grant probate to an individual as substituted executor, under particular circumstances.(d) This limited administration does not constitute the person either executor or administrator, as it is merely to keep the goods in safe custody, and to do other necessary acts for the benefit of the estate.

## ADMINISTRATION GRANTED TO A CREDITOR.

It is said the right of a creditor to take out administration is warranted by custom, and not by express law. Preparatory to a \*creditor taking out administration, the ordinary must issue a citation [\*120] for the next of kin in special, and all others in general, to accept or refuse letters of administration, or show cause why they should not be granted to a creditor;(e) but the court will not sanction an application on the part of a creditor to revoke the administration, as it would be tending to establish the right of a creditor to contest an administration already granted.(f) But it has very properly been determined, that administration to an undertaker for the expenses of the funeral, on a mere affidavit of debt, will be refused, notwithstanding there is no known relation to the deceased, and the person ordering the funeral will be held responsible for the expenses thereof.(g) And by the 33 Geo. III., c. 87, if after the expiration of twelve calendar months from the testator's death, the executor to whom probate had been granted shall continue to reside out of the jurisdiction of his majesty's courts, a creditor may, on application in the manner before referred to being made, obtain administration.

## ADMINISTRATION TO THE CROWN.

The right to goods belonging to persons dying intestate, without leaving husband or widow, and without kindred, as *bona vacantia*, has

(b) Robieson v. Bell, 17 L. J., De G. & S. 630.

(c) Howell v. Metcalf, and see Waddilove, E. D.

(d) In re goods E. Wilmot, 16 Jur. 1026.

(e) Burn, Eccl. L.

(f) Waddilove E., Di. 30.

(g) In goods M. Fowler, 16 Jur. 894.

from the earliest times been vested in the king, in right of his crown.<sup>(h)</sup>

By the 15 Vic., c. 3, administration of the personal estate of intestates and others, where her majesty is entitled, may be granted to the solicitor of the treasury for the time being, and his successors (as nominee of the crown,) and moneys not claimed by the grantees of the crown, are to be carried to the consolidated fund, and claims afterwards established are to be paid out of such fund.

Where a bastard dies intestate, and without wife or child, the goods belong to the crown, although it is usual to transfer the claim of the [121] crown to some appointee, to whom the ordinary grants administration;<sup>(i)</sup> and administration to the effects of a bastard, have, under particular circumstances, been granted to a creditor, there being no wife or child.<sup>(k)</sup>

The queen, as being entitled to the Duchy of Lancaster separate from the crown of England, is entitled to the goods of a bastard intestate, dying without next of kin, in right of her Duchy of Lancaster.<sup>(l)</sup>

Where no next of kin appears to claim administration, and administration is taken out by the solicitor to the treasury, and subsequently the next of kin appears, and proves his claim, the administrator will be called upon for interest, at four per cent., on stock sold out by him, from the time when it was sold out.<sup>(m)</sup>

#### ADMINISTRATION DE BONIS NON.

This administration is granted when the first administrator dies before he has fully administered.

The death of the first administrator will be presumed where he has been long absent, and not heard of; for where administration had been granted in 1832, and the administrator, before he had wholly administered, left his home, and had never since been heard of, notwithstanding advertisements had been published and inquiry made, the court upon application of one of the residuary legatees, allowed administration *de bonis non* of the testator to pass, with justifying security.<sup>(n)</sup>

So the court will grant administration *de bonis non* with a will annexed, to the representative of the next of kin entitled to a fractional part of the residuary estate, such representative being entitled in the distribution.<sup>(o)</sup>

(h) Dyke v. Walford, 5 E. F. M. 434; 12 Jur. 839.

(i) Vin. Abr. and see Toller's Exors.

(k) Hagg. R.

(l) 5 Moor's Re. 434.

(m) Turner v. Maule, 3 De G. & S. 497.

(n) In re goods J. Kemp, P. C., 17 February, 1853.

(o) 2 Hagg. 60.

## \*CHAPTER IX.

[\*122]

## ASSETS AND CHATTELS REAL.

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Legal Assets.	Judgment of Assets <i>quando acciderint</i> .
Equity of Redemption, how considered.	Marshallings Assets.
Foster v. Handley.	Several Funds and several Claimants.
Executors may convert Assets.	Operation of 3 & 4 Wm. IV., c. 106,
Operation of 11 Geo. and 1 Wm. IV., c. 47.	with regard to Assets.
Executor paying money upon erroneous construction of Will.	Chattels Real.
Advowsons.	How descend.
	Heir Looms.
	Not devisable from the Inheritance.

ASSETS here alluded to (as distinguished from the same term made use of in trade, when speaking of a persons effects) include real and personal property in the hands of an heir, executor or administrator, enough to satisfy the debts, liabilities and legacies of the testator. They may be distinguished by their being either legal or equitable: the former are recoverable through the instrumentality of a court of law, by the heir or executor—the latter, through the intervention of a court of equity.

Legal assets, therefore, are such as constitute the fund for the payment of debts according to their legal priority; equitable being subject to distribution on equitable principles, according to which, as equity follows equality, they are divided *pari passu* amongst all creditors.(a)

An equity of redemption was, until recently, considered (notwithstanding the 3 & 4 Wm. IV., c. 104) as merely an equitable interest, and accordingly decided to be equitable assets.(b) Various, however, were the opinions upon the question, and notwithstanding it could be collected from the authorities, that \*mortgaged hereditaments belonging to a testator, and redeemed by the executor, although only recover- [\*123] able in equity, were assets at law—yet the contrary opinion prevailed with regard to an equity of redemption, in other cases; the doctrine appears, however, to have been finally settled in Foster v. Handley,(c) which was a creditors's suit, under which the equity of redemption in fee, in an estate subject to the mortgage, had been sold, and it was contended that the residue became legal assets under the 3 & 4 Wm. IV., c. 104. Lord Cranworth observed, that a specialty creditor must be paid in full, and that there was nothing to guide as to the meaning of the Act of Parliament except the language—"When any person shall die seized of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal, or incorporeal or other real estate, whether freehold, customary hold, or copy-hold, which he shall not, by his last will, have charged with or

(a) B. Ab. Fonbl.; Burn's E. L.

(b) 1 Vern. 410. Plucknet v. Kirk. Sawley v. Gower. 2 Vern. 61. Tre v. Perryor.

(c) 15 Jur. 73.

devised subject to the payment of his debts, the same shall be assets, to be administered in Courts of Equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty." Then comes this proviso—"Provided always, that in the administration of assets by Courts of Equity, under and by virtue of this act, all creditors in specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands." That is to say, in every suit in which freeholds and copyholds, not having been devised for the payment of debts, are to be administered, all specialty creditors shall be paid in full before the simple contract creditors. This was not assets at all, legal or equitable, before the act passed; and the act says, "it shall be legal assets in a particular mode."

In the absence of any particular direction or trust as to the appropriation of assets coming into an executor or administrator's hands, he may convert them into ready money to answer the demands made upon him [\*124] in the capacity which he has \*assumed, satisfying those demands according to their strict legal priorities.(d)

It is said that those assets that are clearly legal shall not assume, by being recoverable only in equity, an equitable nature; and that if a mere trust estate descend on the heir at law, notwithstanding the necessity of resorting to a Court of Equity to reduce it into possession, yet it shall be legal assets, since a trust estate is made assets by the statute of frauds.(e)

Previous to the 3 & 4 Wm. IV., c. 104, where lands were devised to be sold for the payment of debts, they were assets merely for that purpose; and if they had been given for the payment of legacies, and not for debts, they must be appropriated only for the particular purpose of paying legacies; but the operation of that act expressly makes them liable for the payment of debts, but does not interfere with their being marshalled.

The 3 Wm. & Mary, c. 14, made freehold lands in the hands of an *hæres factum* bound by specialty debts, although an *hæres natus* was liable to specialty debts in respect of lands descended;(f) it must, however, be remembered, that in the absence of a direct trust to sell and convert land, and appropriate for the payment of debts, the personalty must be first exhausted. And the 11 Geo. and 1 Wm. IV., c. 47, s. 2, for remedying frauds committed on creditors by wills, declares all wills and testamentary limitations, dispositions or appointments, already made by persons, or to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term or charge out of the same, whereof any person or persons at the time of his, her, or their decease, shall be seized in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last will or testaments, are to be deemed

(d) See *ante*, p. 96, and *Ousley v. Anstruther*, 10 Beav. *Lomax v. Lomax*, 13 Jur. 1064.

(e) *Toller's Exors.*

(f) 3 Sug. V. & P. 151.

or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and \*assigns, and every of them with whom the person or persons making such wills or testaments, limitations, dispositions or appointments, shall have entered into any bond, covenant, or other specialty binding his, her, or their heirs) to be fraudulent and utterly void, and of none effect—any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding. [\*125]

Creditors are empowered to maintain actions of debt or covenant upon the bonds, covenants, and specialties, against the heir at law of such obligor and such devisee, or the devisee of such first-mentioned devisee. (g) If there is no heir at law, actions may be maintained against the devisee. And an exception is made in favour of limitations for just debts, or portions for children; (h) and in those cases where the heir at law is liable to pay the debts of the ancestor, in regard of any lands descended to him, and sells or makes over the same before any action brought, he is answerable for such debts to the value of the lands sold; in which cases creditors are to be preferred as in actions against executors and administrators, and execution taken out to the value of the land as if the same were his own proper debt, but lands *bona fide* aliened before action brought are not liable to such execution. (i)

Devisees are placed in the same position as heirs at law with regard to lands devised to them and aliened before action brought,—and traders' estates are to be considered as assets to be administered in courts of equity; but all creditors by specialty, in which the heirs are bound, are to be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, are to be paid any part of their demands. (k)

The 5 Geo. II., c. 7, s. 4, declares negroes, and other real estate within the British plantations in America, belonging to any person indebted, to be liable and to be chargeable with all debts, duties and demands, of whatever nature or kind, owing by any such person to his majesty and any of his subjects, and are considered assets for the satisfaction thereof, in the same manner \*as real estates are liable, by the law of England, to the satisfaction of debts due on bond, [\*126] or other specialty, and are to be subject to the like remedies, proceedings, and process, in any court of law or equity, in any of such plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, hereditaments and real estate, towards the satisfaction of such debts, and in like manner as personal estates, in any of the said plantations respectively, are sold or disposed of for the satisfaction of debts.

An executor will not be charged with having assets through his having paid a legacy upon an erroneous construction of the will. (l)

Lord Coke observes, that an advowson is assets to satisfy a warranty, but that an advowson in gross is not extendable upon writ of elegit,

(g) Sect. 3.

(h) Sect. 5.

(i) Sect. 6.

(k) Sect. 9.

(l) Clark v. Bates, 2 De G. & S. 203.

because no annual value can be set upon it ; but it has since been settled that an advowson in gross, whether the owner's interest therein is legal or merely equitable, is assets for the payment of debts, and the court of chancery will direct a sale accordingly.(*m*) In a subsequent case, (*n*) Lord Ardwick remarked that it had been said, the authorities went no further than where there had been a trust of an advowson, and did not extend to a legal interest, but that this argument was quite cut up by the roots by the determination in the house of lords of *Tong v. Robinson*.

The operation of the 3 & 4 Wm. IV., c. 104, has effectually removed these distinctions, and makes an advowson assets on the same footing as real estate.

A judgment of assets *quando acciderint*, was held to include, as well the assets received by the executor after that judgment was signed, as also the assets that came or ought to have come into his possession, between the issuing of the writ or the plea, and the judgment, in the due course of administration.(*o*)

[\*127]

\*MARSHALLING ASSETS.

Marshalling of assets, signify an arrangement of the funds according to their different classes, for the purpose of enabling all persons having an equitable or beneficial interest, or who claim an equitable or beneficial interest therein, to have the same apportioned to them accordingly, notwithstanding there are intervening claims.

Where there are several funds, and several claimants against them, and at law, one of the claimants may resort to either fund for satisfaction, but the others can resort only to one ; equity will interpose and marshall the funds, and allow the party whose remedy at law is confined to one fund, to receive his proper portion.

If, at the death of a testator, there are ample funds to satisfy simple contract and specialty creditors, but the executors commit a devastavit of a part of the personal assets, and expend the residue in payment of specialty debts, the simple contract creditors will not, by the devastavit having been committed, be prevented from marshalling.(*p*)

A testator devised his leaseholds, subject to his debts and legacies, and to the estate for life of his wife, to fall into the residue which he gave to J. H. and five others, and appointed J. H. an executor, and died in 1834, leaving his widow and six residuary legatees, and also certain debts ; J. H. bought the shares of four of his co-residuary legatees, and in 1845 deposited with the plaintiff, as security for a sum borrowed, the title deeds of certain of the leaseholds and freeholds, which passed under the will, with a memorandum referring to a note of hand for the amount, and stating it to be a deposit of his house and premises at E., undertaking to execute a conveyance of the property, when required. Many of the debts of the testator remained unsatisfied in 1843 and 1845, and under these circumstances it was determined first that this was a good

(*m*) *Tong v. Robinson*, 3 Vin. Abr. 144.

(*n*) *Westfaling v. Westfaling*, 3 Atk. 460.

(*p*) *You. and Col. N. C.* 211.

(*o*) 5 Dowl. & L. 732.

equitable mortgage, and \*was extended to include the beneficial interest in the five-sixths of the premises referred to at E., and [\*128] not a mortgage as executor, that the plaintiff might, if the security proved inadequate, marshal the assets.(q)

It was also laid down in the above case, that purchasers from executors or other persons having power to deal with real estate, in the absence of anything tending to create a supposition, that the executors are selling for payment of debts, are discharged from seeing to the application of the purchase moneys.

The 3 & 4 Wm. IV., c. 106, appears to favour the doctrine of marshalling assets; it effects a material change with regard to land to be applied as assets, declaring the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendable according to the common law, or according to the custom of gavelkind, or borough English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry, or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, shall be in possession, reversion, remainder, or contingency.

The "purchaser" is to mean the person who last acquired the land otherwise than by descent, escheat, partition or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent. The word "descent" is extended to mean the title to inherit land by reason of consanguinity, as well where the heir is an ancestor or collateral relation, as where he is a child or other issue. The word "descendants" of any ancestor, extends to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land," extends to the last person \*who had a right thereto, whether he obtained the possession or receipt of the rents and profits or not; and the word [\*129] "assurance" is to mean any deed or instrument (other than a will) used for the conveyance of any land, at law or in equity.

Descent is to be traced from the purchaser, and the person last entitled to the land is considered to be the purchaser thereof, unless it is proved he inherited the same; and in tracing the descent, the last person from whom the land shall be proved to have been inherited, is in every case considered to have been the purchaser, unless it is proved that he inherited the same.(r)

In those cases where land shall have been devised by any testator, who shall die after the 31st day of December, 1833, to the heir, such heir will be considered to have acquired the land as a devisee, and not by descent; so where any land shall have been limited by any assurance

(q) Haynes v. Forshaw, 17 Jur. 930.

(r) Sect. 2.

executed after the 31st of December, 1833, to the person or the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.<sup>(s)</sup>

Where any person has acquired any land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the 31st of December, 1833, or under a limitation to the heirs, or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator, who shall die after the 31st day of December, 1833, such land shall descend, and the descent traced as if the ancestor named in the limitation had been the purchaser.<sup>(t)</sup>

Brothers and sisters are considered to inherit not immediately from his or her brother or sister, but the descent must be traced through the parent.<sup>(u)</sup>

The lineal ancestor may be heir to any of his issue, and where there [\*130] shall be no issue of the purchaser his nearest lineal ancestor \*shall be his heir; so that the father will be preferred to a brother or sister, and a more remote lineal ancestor, to any of his issue other than a nearer lineal ancestor.

The alterations in the law of inheritance, by these recent enactments, extend to copyholds. But the customs prevailing in copyhold manors, as to the parties entitled in cases of intestacy, are not interfered with.

#### CHATTELS REAL.

Chattels real, saith Sir Edward Coke, are such as concern or savour of the realty, as terms for years of land, wardships in chivalry (while the military tenures subsisted,) the next presentation to a church, estates by statutes merchant, statute staple, elegit, and the like. They are interests issuing out of land, or annexed to real estate, and are not equal to the lowest estate of freehold.

Chattels real being, as it were, so inseparably attached to the freehold, that their severance therefrom would, in many instances, be a dispoliation of the inheritance—the law allows them to accompany it wherever it descends.

It is the immobility of a chattel which renders it *real*,<sup>(v)</sup> and it is not transferable by those species of assurances, for the perfecting of which, livery of seizin was essentially requisite.

Chattels real necessarily descend to the heir at law with the inheri-

(s) Sect. 3.

(t) Sect. 4.

(u) Sect. 5.

(v) Where a person is seized of an advowson, and the Church becomes vacant in his lifetime, if he dies before he has presented, the right of presentation devolves to his executors or administrators, because it is considered as a chattel real; but if the incumbent of a church be also seized in fee of the advowson of the same church, and dies, the right to present will devolve to his heir, and not to his executor; for the avoidance and descent to the heir, happening at the same instant, the title of the heir shall be preferred, as the most ancient and worthy. Cru. Dig. 3—14.

tance, as well also as heir looms, which are personal chattels, as pictures, deer, and the like, which by some particular custom have descended, and gone along with the inheritance to the heir. In *Morgan v. Earl of Abergavenny*, 14 L. T., 328 C. P., it was laid down, that by the general law, deer go to heir at \*law, but if tame and reclaimed, they [\*131] become personal property, and go to the personal representatives, and not to the heir—that whether the deer are tame and reclaimed, must be determined with reference to the nature of the place where they are kept, and the mode in which they are treated.

An estate in fee in our American plantations, was considered a chattel real until creditors were satisfied, when the land then descended in its usual course to the heir; (w) but since the 3 & 4 Wm. IV., c. 104, and c. 106, it is apprehended it would be considered in all respects as other land, and liable to the payment of a testator's debts in the same manner.

It may be collected from the authorities, that heir looms cannot be devised away from the inheritance by will—for the law does not invest the owner with the power of devising that away from the estate, which special custom declares unseverable by such means. In the case of *Evans v. Evans*, (x) there was a direction for certain chattels to be considered heir looms, and to pass with the house which the testator devised—but by a codicil the house was given to another person, and a residuary bequest was made; the court, however, determined that the chattels must pass with the house, the object of the testator being, that the chattels should pass as heir looms.

The owner, however, may of course dispose of them during his life, as he might of any other portion of the freehold; but at his death, being vested instantaneously in the heir by the special custom, the devise which does not take effect until after his death, is postponed to the custom by virtue whereof they have already descended. (y)

This nice distinction, upon consideration, cannot really exist (for the same instant the heir takes, the devise must operate, and *nemo est hæres viventis*,) but may have been used as a pretext on which to give the heir, in former times, the priority over the devisee, until it became looked upon and established as a custom.

\*It is a general rule that trees, standing on the land at the ancestor's death, descend to the heir, as well as growing grass; [\*132] but corn, and every other vegetable produced annually by labour and cultivation, goes to the executor or administrator of the ancestor, as a compensation for the expenses of raising them.

(w) 3 Ves. Junr. 118; Toller's Exors. 415.

(x) 14 Jur. 383.

(y) Bl. Com.

[\*133]

## \*CHAPTER X.

## CHARITABLE AND VOID BEQUESTS, AND THE ADMINISTRATION OF CHARITABLE TRUSTS.

Statutes of Mortmain.

Exceptions.

Way v. East.

Interest in Land, whether devisable for Charitable purposes.

Shares in Incorporated Companies.

Direction in Will as to Payment of Charitable Legacies.

Nash v. Morley.

Bequest for improvement of Real Estate belonging to Charity.

Bequest contrary to Christian Religion.

Abatement of Charitable Legacies.

Charitable Estates leased.

Longstaff v. Renuison.

Administration of Charitable Trusts.

Proceedings under Sir J. Romilly's Act.

Abstract of 16 &amp; 17 Vic. c. 137.

THE uncontrolled power the subject had to dispose of his lands to religious uses, it was found in some measure necessary to check, notwithstanding it had become established (at the period the feudal restraints of alienation had ceased to be noticed,) that any person might dispose of his lands, for what purpose he pleased; but the circulation of landed property becoming gradually stagnated, in consequence of large estates being devised to religious houses, whereby they became incapable of being alienated, the 7 Edward I. was enacted for the purpose of preventing lands being so devised in mortmain; it expressly provides against persons, religious or otherwise, buying or selling, or receiving under pretence of gift, or for a term of years, any lands or tenements in mortmain, on pain of forfeiture to the immediate lord of the fee, and the king. By the subtle devises and ingenuities of the ecclesiastics to avoid those restraining enactments, uses, and trusts, were first introduced, when to guard against those operating as an evasion of the statutes, the 15th Richard II. was passed, declaring, c. 5, that the lands which had been so purchased to [\*134] uses, should be amortized by license from the crown, \*or else be sold to private persons; and that for the future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves. The 23 Henry VIII., c. 10, made future grants of lands, for purposes which were thus in vogue for eluding the last-named statute, void, if granted for any longer term than 21 years. The 18 Edward III., St. 3, c. 3, and the 7 & 8 Wm. III., c. 37, confirmed the prerogative the crown had to grant licenses in mortmain, and to enable spiritual or other corporations to hold lands in perpetuity; since which, many salutary laws have been enacted, for the better regulation of bequests made for charitable purposes—the non-compliance with which, renders the bequest inoperative. The 9 Geo. II., c. 36, declares that no lands, or tenements, or money to be laid out thereon, shall be given for or charged with any *charitable uses* whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its



execution (except stocks in the public funds, which may be transferred within six months previous to the donor's death,) and unless such gift be made to take effect immediately, and be without power of revocation, and that all other gifts be void. The act excepts the two Universities, their Colleges, and the scholars upon the foundation of the Colleges of Eton, Winchester, and Westminster; the British Museum is also excepted by the 3rd section of the 5 Geo., IV., c. 39; and by the 3 & 4 Vic., c. 60, it is enacted that any endowment, grant or conveyance for a site for any church or chapel, or church-yard, or parsonage house, or glebe, or for the use or benefit of any church or chapel of the incumbent or minister thereof, or for the repairs thereof, shall be valid without any license or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law to the contrary notwithstanding. The exemption from the mortmain acts, by the above statute, does not extend to any case where the endowment in the whole exceeds the clear annual value of three hundred pounds; and by the 6 & 7 Vic., c. 37, s. 12, the ecclesiastical commissioners and their successors, for and towards the \*endowment or augmentation of the income of the minister or perpetual curate [\*135] of the district, or for or towards providing any church or chapel, are empowered to hold and enjoy for the purposes aforesaid, any lands, tithes, tenements, or other hereditaments, goods, or chattels, without any license or writ of *quod damnum*, notwithstanding the statutes of mortmain.

The terms of the act must be imperatively complied with, to validate a gift of land for a charitable purpose; and moreover, the spirit of its clauses must not be subverted by secondary stipulations violating its general tenor. In *Way v. East*,<sup>(a)</sup> a rent charge had been granted out of leaseholds to trustees, on charitable trusts, by deed, enrolled in compliance with the act, but there was a private understanding that nothing was to be received until the grantor's death, which did not occur until eleven years afterwards—it was argued, that as the deed was made twelve months before the testator's death, and duly enrolled, it was a sufficient compliance with the statute, and that parol evidence ought not to be admitted to prove any secret understanding contrary thereto. Kindersley, V. C., concurred in the opinion, that, apparently, all the requisitions of the statute had been complied with—but the plaintiffs insisted, that there was an agreement or understanding, or design amongst the parties, that payment of the annuity was not to be enforced under the deed during the life of the grantor, and on this ground contended that the whole ought to be declared void. Therefore the court had no hesitation in saying, that if there was such understanding or design of the grantor, at the time of the execution of the deed, and that was acquiesced in, and known to the other parties, it was not necessary that it should appear on the face of the instrument, to bring it within the operation of the statute of mortmain, the onus rested on the plaintiffs who alleged such design.

It therefore follows that land cannot be devised for a charitable purpose, whether it is freehold, copyhold, or leasehold, nor can money charged upon or arising from such property, nor money to be laid out in the pur-

(a) W. R. 114, 1854.

[\*136] chase of such property, or in paying off \*any incumbrances thereon, or to be invested by way of mortgage upon such property, nor can shares in a joint stock bank, the property of which consists of freehold and copyhold estates, and mortgages for terms of years; but shares in a joint stock canal and dock companies, are not within the statute of mortmain, nor are moneys,<sup>(b)</sup> due upon bonds given by such companies, under the powers of their acts for raising money on mortgage.<sup>(c)</sup>

Shares in incorporated companies, although having interests in lands, where constituted by Act of Parliament, whereby the shares are declared to be personal estate, are exempted from the operation of the mortmain Act—9 Geo. II., c. 36.<sup>(d)</sup>

So shares in an incorporated banking company, which was authorized to hold land by way of mortgage, and which had been constituted by deed of settlement, by which the shares were declared to be personal estate, were held not within the operation of the statute.<sup>(e)</sup>

#### DIRECTION AS TO PAYMENT OF CHARITABLE LEGACIES.

It is not sufficient for a testator to declare that charitable legacies shall be paid out of his personal estate, because under this denomination are comprised many species of property, which the law does not allow to be given to a charity. The direction should be, to pay the charitable legacies out of such part of the personal estate, as does not consist of chattels real, or real securities (which would be equivalent,) out of such part as may be legally devoted by will to charitable purposes. A declaration to this effect is rendered necessary by the doctrine well established, that equity will not arrange the several species of property of which a residue is composed, in such a manner as to throw charitable legacies exclusively upon the funds legally applicable to the payment of them, but applies the whole residue in satisfaction of all the legacies, *pro rata*.<sup>(f)</sup> Thus, if a testator has bequeathed pecuniary legacies to charities, out of his [\*137] personal estate, and such \*estate consists of one-third of real securities or leaseholds, and two-thirds of stock in the funds, or other personal property, not savouring of the realty, the charitable legacies would be invalid to the extent of one-third, being the proportion which the real securities and leaseholds, bore to the whole fund.<sup>(g)</sup> So a simple declaration that charity legacies are to be paid out of pure personalty, will not give to such legacies a priority upon the pure personalty over other legacies and charges, nor exempt any part of the estate from the ordinary rules of applying and distributing the assets.<sup>(h)</sup>

A bequest to trustees, to apply a sum of money in building six almshouses, and to pay the income of the residue to the six almsmen residing therein, was declared void;<sup>(i)</sup> and similarly has been treated a bequest

(b) Walker v. Milne, 13 Jur. 233.

(c) Miers v. Perigal, 18 L. J. 185.

(e) Ashton v. L. Langdale, 20 L. J. 234.

(f) Hay & Jarm. on Wills, 329.

(g) Williams v. Kershaw, 1 K. 274, n.

(i) Smith v. Oliver, 11 Beav. 481.

(d) 9 Beav. 450; 16 L. J. 57.

(h) Sturge v. Dimsdale.

of personalty to trustees, to be applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility. *(k)*

The dictum of Lord Eldon, that "an attorney shall not take from his client a gift or reward, while standing in that relation, the connexion between them subsisting with the influence attending it, though the transaction may be as righteous as ever was carried on," was carried out in the case of *Hindson v. Weatherill*, *(l)* and a gift of personalty, and interest in real estate, by a client to his solicitor, who prepared the will, was *declared void*. The court, in its judgment, relied on the observations used by Lord Eldon in *Hatch v. Hatch*, and observed, that this was a case entirely within the application of the general principle, never to be departed from except upon adequate grounds, that so long as the relation of solicitor and client subsists, on any matter of bounty, there must be that done which shall show that all *infirmit*y arising from that relation has been substantially cured.

A gift, to be divided amongst poor persons, male or female, old or infirm, as the executors see fit, "not omitting large and sick families, if of good character," is a valid charitable bequest. *(m)*

\*The court, in alluding to the doctrine upon which such gifts will be supported, observed, upon the case of *James v. Allen*, *(n)* [\*138] where it was said, "if the words made use of in the devise were such as to preclude the court from compelling the trustees to apply the funds to purposes strictly charitable, the trust could not be maintained." The question in all such cases is, whether it is not only the duty of the trustee, but a duty the performance of which will be enforced by the court of chancery, to apply the whole fund to purposes charitable. If there be any option in the trustee to apply the funds to purposes which, though liberal or benevolent, are not such as the court understand to be charitable, the trust cannot be executed. And where it is expressly declared that the fund is to be distributed in private charity, the court will not execute such a trust.

A bequest of money for the repair or improvement of real estate, already belonging to a charity, is good *(o)*—as is likewise an annual bequest for the repair of a tomb: and if it proceeds out of a life interest, is not void as a perpetuity—but if the devise had been of rents to a minister and churchwardens, for the purpose first of taking a specific sum for themselves, and then repairing a tomb, it would be void; because such devise would be a devise of the fee or inheritance, upon trust to cause a tomb to be repaired every year, and is a perpetuity. *(p)*

A testator may bequeath a certain sum, upon trust, to apply the annual proceeds thereof to certain indigent or poor persons, from year to year, in perpetuity—and it must be observed, that in case of the failure of the objects, the court of chancery would see to the due administration of the fund.

Thus, where a testatrix, by her will, dated in 1836, directed her exe-

*(k)* *Kendall v. Grainger*, 5 Beav. 300.

*(l)* 22 L. T. 250.

*(n)* 3 Mer. 19.

*(o)* 8 Ves. 186.

*(m)* *Nash v. Morley*, 5 Beav. 177.

*(p)* *Loyed v. Loyed*, 16 Ju. 306.

cutors to pay a clear yearly sum of £100, "for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostical doctrines, brought forward originally by the late Edward Irving, who may be persecuted, aggrieved, or in poverty, for preaching or upholding those doctrines, or half the sum may be appropriated for the \*benefit of the church founded by the late Edward Irving, in [\*139] Newman Street," and died in 1845, an information was filed to have the fund applied under the direction of the court. The master found that there was a class of persons existing answering the description of members and ministers, &c., who were persecuted, &c., contained in the will; and that there also existed a church in Newman Street, which was intended to be described by the testatrix, whereupon it was held that the bequest was a valid charitable bequest.<sup>(q)</sup> But a bequest of the residue of personal estate to trustees, to apply the same towards establishing a school, is void.<sup>(r)</sup>

So a bequest will be void if it is contrary to the christian religion—as where it is for a prize essay, showing "the adequacy and sufficiency of natural theology, when so taught as a science, to constitute a true, perfect, and philosophical system."<sup>(s)</sup> So likewise a bequest of a prize for an essay on the subject of emigration to the United States, is void for uncertainty.

The court cannot, without violating the statutes of mortmain, approve of a scheme embracing a proposition by a testator to give a piece of land for the purpose of having almshouses built upon it.<sup>(t)</sup>

But where a testatrix, possessed of leaseholds and pure personalty, left the whole of her property to her brother, and her pure personalty was more than sufficient to pay her debts and funeral and testamentary expenses, and her brother died nine days after her, and left the whole of his property to charities, and his executors took out administration to the testatrix, and sold the leaseholds, it was determined that the charities were entitled to the proceeds under the will.<sup>(u)</sup>

The doctrine of Cypres has been held to extend to cases of bequests for charitable purposes; for where there was a bequest for the benefit of [\*140] poor persons, whose debts did not exceed £5, \*which was rendered inoperative by the passing of the 1 Vic., c. 110, a scheme was approved of extending the charity to cases where the debts did not exceed £30.<sup>(v)</sup>

#### ABATEMENT OF CHARITABLE LEGACIES.

Charitable legacies are liable to abatement in those cases where a testator, by his will, gives various sums to individuals, and certain legacies to charities, and the general personalty is found sufficient to pay all the debts, funeral and testamentary expenses and legacies, but the pure per-

(q) *Att.-Gen. v. Laws*, L. J. 300 C.

(r) *Longstaff v. Remington*, 16 Jur. 559.

(t) *Att.-Gen. v. Roake*, before M. R., 1850.

(u) *Shadbolt v. Thornton*, 13 Jur. 597. 17 Sim. 49.

(v) *In Merchant Tailors' Company*, and see *ante*, p. 44.

(s) *Briggs v. Hartley*, 14 Jur. 683.

sonalty insufficient for those purposes, and they will abate in the proportion which the pure personalty bears to the whole personalty.(w) But where a sum of money was given to the poor of three parishes, and was considered doles of the funeral, the court considered it was not a case for abatement of the legacies.(x)

Where charity estates are leased, and the consideration is inadequate, the court has power to set aside such lease.(y) So where a tenant has expended a considerable amount on the lands belonging to the charity, and is willing to take a lease at an improved rent in consequence, but is outbid by another person offering to give more, the claims of the old tenant will be disregarded for the benefit of the charity, and the largest offer accepted, provided the excess offered, exceeds the amount of compensation the old tenant would be entitled to on being compelled to quit the premises.(z)

#### MONASTIC BEQUEST.

A bequest of annuities to a monastic institution, for the benefit of the children attending the schools, has been held good; but a similar bequest of annuities for the support of the chapel of the monastery and its lands, was declared void.(a)

\*In *Longstaff v. Rennison*(b) it was laid down, that where money is given upon trust, if the proper execution of the trust [\*141] would be to bring fresh lands into mortmain, the legacy would come within the purview of the Statute of Mortmain.

But the statute does not extend to the proceeds to arise from the sale of real estate in New South Wales, to be appropriated for the advancement of education throughout the world.(c)

#### ADMINISTRATION OF CHARITABLE TRUSTS.

Amongst the many salutary laws that have been enacted for the administration of charitable trusts, will be found the 52 Geo. III., c. 101, (Sir Samuel Romilly's Act) which provides a summary remedy in cases of abuse of trusts created for charitable purposes; it enables two or more persons, in case of a breach of trust, or supposed breach of trust, created for charitable purposes, (or whenever the direction of a Court of Equity shall deem necessary) to present a petition to the lord chancellor, or master of the rolls, or to the Court of Exchequer, stating the complaint, and praying such relief as the nature of the case may require—who are to hear such petition in a summary way, and upon affidavits, or such other evidences, as shall be produced upon such hearing, to determine the same, and make such order thereon, and with respect to the costs of such application, as seem just.

(w) *Robinson v. Geldard*, 14 Jur. 143. 18 L. J. 454.

(x) *Att.-Gen. v. Robins*, 2 P. Wms. 25.

(y) *Att.-Gen. v. Pilgrim*.

(z) *Att.-Gen. v. Gains*, 11 Beav. 63.

(a) *Carberry v. Cox*, L. C. ir.

(b) 16 Jur. 559.

(c) *Att.-Gen. v. Stewart*, 2 Merv. 143.

The order so made will be final and conclusive, unless the party who thinks himself aggrieved thereby, within two years from the time when the order has been passed and entered by the proper officer, prefers an appeal to the house of lords.

The petition requires to be signed by the persons preferring the same, in the presence of the solicitor concerned for such petitioners; and every such petition must be submitted to and allowed by the attorney or solicitor-general, who has to certify before the petition can be presented.

The 7 and 8 Vict., c. 97, applies to charitable donations and bequests in Ireland.

[\*142] Under Sir Samuel Romilly's Act, the court has jurisdiction to \*declare the proportions in which the charitable objects are entitled, but not to repair a previous misapplication of the funds.<sup>(d)</sup> So it has jurisdiction not only in those cases where trustees of charity estates require directions to carry out a trust, but where, notwithstanding the application of future surplus moneys have been provided for by act of parliament, the trustees pray for a reference as to the expediency of applying for another act, to authorise the application of the surplus in a different manner.<sup>(e)</sup> On the other hand, where an adverse claim is set up, claiming charity funds that for a lengthened period have been duly appropriated, such claim should come before the court by way of information, and not by petition, under the 52 Geo. III., c. 101.<sup>(f)</sup>

The act for the better administration of charities<sup>(g)</sup> coming into operation on the 20th day of August, 1853, provides means for securing the due administration of charitable trusts, and for the more beneficial application of charitable funds.

It empowers her majesty to appoint four commissioners, one secretary, and two inspectors—three of the commissioners to hold office *quamdiu bene se gesserint*, and the fourth, and secretary and inspector, *durante bene placito*.<sup>(h)</sup>

It precludes the commissioners, secretary, or inspector, from being members of the House of Commons. Two of the commissioners are to form a board,<sup>(i)</sup> who are, by general minutes from time to time, to prescribe regulations for their proceedings, but those minutes are to be signed by three of the commissioners, and copies laid before both houses of parliament.<sup>(k)</sup>

And the board are, at their discretion, empowered to inquire into all charities in England or Wales, and the nature and objects, administration, management, and results thereof, and the value, condition, management, and application of the estates, funds, property, and income belonging thereto—and such inquiry the commissioners may order to be made by their inspectors.<sup>(l)</sup> And all trustees, or any person having any [\*143] concern in the management \*of any charity, must render to the Board, if required, the accounts and statements, in writing, in relation to the charity, and also return answers to any questions or

(d) 1 M. N. & Gor. 324; 1 H. & T. 401.

(e) H. & S. 401.

(g) 16 & 17 Vic. c. 137.

(i) Sect. 5.

(f) Magdalen Charity, 9 Hare, 624.

(h) Sect. 1.

(k) Sect. 7.

(l) Sect. 9.

inquiries addressed to them by the board relating thereto ;(*m*) and copies may be taken by the direction of the commissioners, and search made of registers and records in every Court of Law and Equity, and Ecclesiastical Court, and public registry, and office of records, without payment of any fee.(*n*)

The inspector may, by precept under his hand, require any person in any way connected with a charity, or the funds thereof, to appear before him, at any time and place, and to produce any paper, writing, or document, being in the custody or power of such person, and relating to a charity, and moreover examine such persons upon oath, as well as all persons voluntarily attending before him ; but no person is to be compelled to travel more than ten miles, in obedience to such precept, from his place of abode,(*o*) and persons giving false evidence are guilty of a misdemeanor.

Persons refusing to attend before the board of inspector, or to render an account or statement, or to make answers to questions, or to give evidence, or wilfully altering or destroying, or refusing to produce any writing or other document, are guilty of a contempt of the Court of Chancery, and may be committed on summary application by the commissioners.(*p*)

The act provides against the board requiring persons claiming property adversely to any charity to be called upon for information, or to produce deeds or other documents, and persons may apply to the board for their opinion and advice concerning any charity, wherein such persons are trustees, or have anything to do with the same, or in case of any dispute. The board may give advice accordingly, which nevertheless is subject to any judicial order which may be afterwards given by any court. The persons acting under such advice are to be considered to be complying with their trust.(*q*) So that a trustee under any charity may now, with facility, clear himself from any responsibility that \*would otherwise attach in the administration of the funds of a charity ; but in obtaining such advice, there must be no conceal- [\*144] ment of any facts, for such concealment might operate as a fraud in obtaining the advice, which the act expressly discountenances.

Before any suit or proceedings (not being an application in any suit or matter actually pending)(*r*) for obtaining any relief, order, or direction, concerning or relating to any charity, is commenced, there must be transmitted to the board notice explaining the nature thereof, and the board may order such proceeding to be commenced, subject to stipulations for securing the charity against costs, or may order the proceedings to be delayed ; and no suit will be entertained for obtaining relief, order, or direction, by the Court of Chancery, or by any court or judge, except it is in conformity with a certificate of the said board.

The above provision does not extend or affect any petition or proceed-

(*m*) Sect. 10.

(*n*) Sect. 11.

(*o*) Sect. 12, 13.

(*p*) Sect. 14.

(*q*) Sect. 16.

(*r*) This exception does not apply to a petition with respect to a fund which has been paid into court, under the Trustee Relief Act. W. R. 217, 1854.

ing in which any person claims any property, or seeks relief adversely to any charity.

Where it appears to the board that legal proceedings are requisite, and it is desirable such proceedings should be instituted by the attorney-general, they must certify the case to the attorney-general, who will thereupon prosecute if he thinks it advisable. The board are to consider proposals made by trustees of charities, for leases and improvements, who are empowered to grant orders under seal for such leases or improvements, although the leases or improvements are not authorized by the trust; and the board may also authorize the trustees to raise money by mortgage on the charity estates. But in every mortgage must be compulsory provisions for payment of the principal money borrowed, by *annual instalments*, and for redemption and re-conveyance within thirty years.

The board may empower trustees to dismiss any officer of a charity, but where there is any special visitor of the charity, the consent of such visitor, in writing, is necessary to such removal.

[\*145] \*Persons acting in the administration of any charity, or suit against any person, may submit to the board a proposal for a compromise, and the board may make such order thereon as they may think proper; and upon performance of the terms and conditions thereof, the agreement will be a final bar to all actions, suits, claims, and demands, in respect to which such compromise shall have been made. And under the direction of the board, a sale or exchange of land may be effected—who have also authority to authorize the sale to the owners of the land charged therewith of any rent, charge, annuity, or other periodical payment, charged upon land and payable to any charity.

The leases, sales, and exchanges, will be valid, as if they had been authorized or directed by the trust; and where any land is required for the erection of any building, for any charity, and the owner cannot give a good title in the ordinary manner, the trustee, with the sanction of the board, may purchase the same, according to the provisions of the Lands Clauses Consolidation Act, 1845.

Where the appointment or removal of any trustee, or other relief relating to any charity, of which the gross annual income for the time being exceeds £30, is considered desirable, and such removal might formerly have been given by the Court of Chancery, in respect of its ordinary or special jurisdiction, or by the lord chancellor, entrusted with the care of lunatics, any person obtaining the certificate of the board, or the attorney-general, may make application to the master of the rolls, or one of the vice-chancellors sitting at chambers, for such order or relief, who are to proceed upon and dispose of such application, unless he shall think fit to direct otherwise; and may give such directions in relation to the matter of such application as might have been exercised by the court of chancery or lord chancellor, in a regular suit instituted upon petition. And the master of the rolls and vice-chancellor respectively, in relation to such applications (subject to any rules which may be made by the lord chancellor, with the advice and consent of them or any two of them),

may direct matters to be heard in open court, and of \*ordering what matters are to be heard and investigated by themselves and [\*146] their chief clerks, and have the same powers as are invested in them by the 15 and 16 Vic., c. 80, at chambers; and the provisions of the said act, applicable to orders made by the master of the rolls, or any of the vice-chancellors, at chambers, are to extend to all orders so made; but the determinations so made, in relation to such applications, are not subject to appeal in those cases where the gross annual income of the charity does not exceed £100.

#### JURISDICTION GIVEN BY ACT.

The jurisdiction given to the master of the rolls, and vice-chancellors sitting in chambers, upon any application to them, is to extend concurrently to, and may be exercised by, the chancellor of the duchy and County Palatine of Lancaster, and the vice-chancellor of the same county, as to every charity within the jurisdiction of the court of chancery, whose gross annual income exceeds thirty pounds, upon application being made made to the cancellor or vice-chancellor respectively—and the chancellor of the said duchy and county palatine, with the concurrence of the vice-chancellor of the county palatine, may make rules and orders for regulating the modes of proceeding, and the fees to be taken. The act applies also to any charity where the gross annual income exceeds thirty pounds, established or administered, or applicable for objects or purposes within the city of London, where the gross annual income does not exceed thirty pounds, in like manner as if such income exceeded that amount.

#### JURISDICTION OF COUNTY COURTS.

Where any charity, of which the gross annual income does not exceed thirty pounds, shall be applicable, wholly or partially, for objects within the district, and the appointment or removal of any trustee or other relief shall be considered desirable, and such relief may be made or given by the court of chancery, any person authorized by the certificate of the said board, or the attorney-general, may make application to such district or \*county courts for such order or relief—and the same is to be heard in open court, which is to make such orders and di- [\*147] rections as might have been made or given by the Court of Chancery or the Lord Chancellor, in a suit regularly instituted or upon petition—and the clerk of such county court is to transmit a copy of such order or direction to the office in London of the Registrar of County Courts judgments, to be there enrolled.

It is not, however, in the power of the judge of any district to vary any decree, order, or direction of the Court of Chancery, or of any judge thereof, or to give any order or direction conflicting with any such decree or order.

## COUNTY COURTS HAVING CONCURRENT JURISDICTION.

Where two or more district or county courts have concurrent jurisdiction with respect to any charity, no application in respect to such charity, is to be made or entertained by more than one of such district or county courts at the same time, and the board may order to which of such courts application with respect to the charity is to be made.

The jurisdiction conferred on the county courts does not extend to persons presiding as deputy judges.

## DIRECTIONS AS TO ORDERS MADE BY COUNTY COURTS.

Copies of orders and decisions made by any district court of bankruptcy, or county court, for the appointment or removal of any trustee of any charity, or approving of any scheme relating thereto, are to be forthwith transmitted by the deputy register of such district court, or by the clerk of the county court, to the board, for the purpose of being considered by them; and no order or decision will be valid unless it is approved by the board, who are not to signify their approval until one calendar month has elapsed.

In case the decision is not approved by the board, the same must be remitted by them for re-consideration by the district or county court; or it may direct the subject-matter to which the decision relates, together [\*148] with the decision to be submitted, to the consideration and decision of a judge of the Court of Chancery; and if such latter course is taken, no further proceedings are to be taken, in the district or county court, with respect to the matter in question.

In those cases where a decision has been re-considered by the district or county court, and then disapproved by the board, it must be referred by the board, to the Court of Chancery; or where the charity is within the jurisdiction of the Court of Chancery of the county palatine, to the chancellor or vice-chancellor of the same, or to a judge of the High Court of Chancery, who are respectively empowered to exercise all such jurisdiction and power in relation thereto, as in the case of a charity the gross annual value whereof exceeds thirty pounds.

The proceedings taken by the district or county court may be enforced in the same manner as the other proceedings are enforced under its ordinary jurisdiction, and may exercise such powers as they are invested with by the 9 and 10 Vic., c. 95.

## POWER OF APPEAL.

In case persons aggrieved or dissatisfied with any order made by the District Court of Bankruptcy, or County Court, intend to appeal, they must, within one calendar month, give notice in writing to the court, and also to the board, of their intention—and the board is empowered, if it think proper, to give a certificate that it is reasonable such appeal should be entertained—whereupon the district or county court are to suspend proceedings upon the order appealed against, during such period as the circumstances may require. The board may also require the person ap-

pealing to give security for costs, and indemnify the charity against the costs of the appeal. The attorney-general is allowed three calendar months to appeal, after the making of any order, and without giving notice or security for cost.

#### WHERE ANY ORDER ALLOWING AN APPEAL HAS BEEN MADE.

The person allowed to appeal, in pursuance of any order, must, within three calendar months, present a petition to the court of \*chancery, which must set forth the order appealed against—ther orde [\*149] allowing such appeal, and praying such relief as the case may require—and upon the hearing of the petition, the court will either confirm, vary, or reverse the order appealed against, or remit it to the district Court of bankruptcy or county court, or may proceed as in case of an application under this act, to a judge at chambers; and unless the party allowed to appeal does not present, within three calendar months, such petition of appeal, the order against which such appeal was allowed will be final.

#### POWERS OF ACT DO NOT EXTEND TO TRY TITLES.

No judge of the court of chancery, nor any district court of bankruptcy, or county court, have jurisdiction to try or determine the title at law or in equity, to any real or personal property, or any term or interest therein, between any charity or the trustee thereof, and any person holding or claiming such real or personal property, term, or interest, adversely to such charity, or to try or determine any question as to the existence or extent of any charge or trust.

#### HOW NOTICE OF ALTERATION OF A SCHEME, OR REMOVAL OF TRUSTEE, IS TO BE GIVEN.

It is necessary, before any application is made for the alteration of any scheme, or appointment or removal of any trustee, to give notice in writing, in the manner the board shall have directed; and if the order be, that the notice is to be affixed to or near the church door, the incumbent and churchwardens must allow it to remain not less than fifteen days—and evidence of the notice being affixed, is to be taken as *prima facie* evidence that it remained during the period prescribed by the board.

#### WHERE NO TRUSTEES, OR THEY ARE INCAPACITATED FROM ACTING.

Where any land, or estate therein, holden upon trust for any charity, is vested in any persons other than those acting in the \*adminis- [\*150] tration of the rents—or where there is no trustee, or they are unwilling to act, or it is doubtful in whom such land or estate therein is vested—or they cannot be found, or are under age, lunatic (whether so found by inquisition or not), or are otherwise incapable of acting, or are out of the jurisdiction, or not amenable to the process of the court of

chancery—or where, by reason of the reduced number of trustees, a valid appointment cannot be made—or where, by reason of the expenses incident to the appointment of new trustees, and the conveyance of the estate, it appears desirable, any court having jurisdiction, as aforesaid, may order such land and estate to be vested in the treasurer and his successors, in trust for the charity, without any conveyance.

Where, however, the vesting order is made in respect of any land of a corporation, it must be with the corporation's consent—and if made in respect of copyholds, it must be with the lord's consent—and the court may direct periodical or other payments to be made to the lord of the manor, in compensation for fines or profits, which would have become due upon death or admittance of tenants.

The court or judge may also, by order, divest the treasurer of any land, term, or estate, or order the same to be vested in the acting trustees of the charity.

One month before any new scheme relating to a charity is provisionally approved, notice thereof must be given for insuring its due publicity, containing such particulars thereof as the board considers sufficient; and where the nature of the scheme cannot be conveniently shown in the notice, a copy of the proposed scheme must be deposited in registry of county judgments office, London, for inspection—objections to which must be transmitted to the board within one month from the time when the notice shall have been given.

Where there are no objections received by the board, they may approve of the scheme, and certify the same.

Upon the requisition of any person interested in any charity (upon [\*151] the board considering there is sufficient grounds), the \*matter of the scheme may be referred to one of the inspectors, for examination and local inquiry, who is empowered to hold sittings to hear evidence. The inspector is to give fourteen days' public notice of his sitting.

The inspector will report to the board the result of his inquiry, with his report thereon, and if found satisfactory, may be approved by the board. The certificate of the board is to be under seal, and a copy deposited in the parish in which the charity is situated, and at the office of the registrar of county courts judgments, London.

Direction is given for the board making their annual report, to be laid before parliament, and for entering accounts, and preparing balance sheet, which, when registered by the registrar of county courts judgments, or at the county court of the county, is open to be inspected on payment of one shilling.

There are certain exceptions to which the act does not extend, as the universities of Oxford, Cambridge, London, or Durham, buildings registered as a place of meeting for religious worship, Queen Ann's Bounty and the British Museum, or to any friendly or benefit society, or savings' bank, or any institution for religious purposes, wholly maintained by voluntary contributions—and where any charity is maintained partly by voluntary subscriptions, and partly by income from any endowment, it extends to the income from endowment only—the funds of missionary

societies, not within England or Wales, are exempted from being within the jurisdiction, but the exemption does not extend to any cathedral, collegiate, chapter, or other schools.

Charities exempted may apply, by petition, to the commissioners, to have the benefit of the act; and in case of dispute arising, two-thirds of the members, present at any special meeting, may refer the dispute to the arbitration of the commissioners, whose decision is to be final, and their award made a rule of the court of chancery.

The legal estate in all lands, which, at the passing of the 5 & 6 Wm. IV., c. 76, was vested in the body corporate of any borough which became subject to the provisions of that act, or \*in any one or more of the members of such body, and which legal estate shall [\*152] not have been conveyed to and vested in the trustees, appointed by the Lord Chancellor under that act, are, from the passing of this act, without any actual conveyance, to be vested in the trustees so appointed, subject to the same trusts as they were subject to previously to such vesting; and upon the death or removal of any of the trustees, the legal estate in the same lands shall vest in the persons who, after such death or removal, shall continue to be the trustee for the time being, without any conveyance whatsoever.

On the 8th of December, 1853, the following orders were promulgated:—

1. The clerk of every county court shall keep a book, in the form in the schedule hereunto annexed, to be called "The Charitable Trusts Book," in which a record shall be kept of all proceedings taken in that court in matters of charitable trusts.

2. When any person has obtained the required order or certificate from the charity commissioners, and he is desirous of taking proceedings in the county court, he shall produce such order or certificate to the clerk, who shall retain and file the same in numerical order in his office; and the party producing such order or certificate shall be deemed the plaintiff in such proceedings, and the person served with a summons under order 4, shall be deemed the defendant.

3. When the attorney-general shall propose to take proceedings in the county court, he shall cause to be delivered or transmitted to the clerk a written statement, showing the nature and object of the proposed proceedings, and the clerk shall retain and file such statement in numerical order in his office; and the attorney-general shall, in such proceedings, be deemed the plaintiff, and the person served with a summons under order 4, shall be deemed the defendant.

4. Upon the production of any order, certificate, or statement hereinbefore mentioned, the clerk shall, at the instance of the plaintiff, prepare a summons thereon, in the form set forth in the schedule hereunto annexed, in which shall be stated the substance \*of the order, [\*153] certificate, or statement, and he shall make as many copies thereof as there are parties required by the plaintiff to be summoned, and two additional copies, the one to be filed in the clerk's office, and the other to be transmitted to the charity commissioners.

5. The clerk, if required by the plaintiff, shall prepare a notice to

attend proceedings, in the form set forth in the said schedule, to be served on any persons indicated by the plaintiff, besides those summoned under the last preceding order, and the said clerk shall make as many copies thereof as there are persons to whom such notice is to be given, and two additional copies, one to be filed in his office, and the other to be transmitted to the charity commissioners.

6. The clerk shall forthwith transmit, by pre-paid post letter, a copy of the summons to each of the parties required to appear, and a copy of the *notice to attend proceedings* to each of the persons indicated by the plaintiff, and such transmission shall be sufficient service, unless the judge shall otherwise direct.

7. Where the plaintiff does not require any summons or notice to attend proceedings to be issued, the clerk shall prepare a notice of hearing, in the form set forth in the said schedule, and two additional copies thereof, one to be filed in his office, and the other to be transmitted to the charity commissioners, and shall either deliver such notice to the plaintiff, or cause it to be served on him by pre-paid post letter, unless the judge shall otherwise direct.

8. In all cases it shall be competent for the clerk, if required by the plaintiff, to summon some persons, and to serve others with either or both of the said notices, or to serve a notice of hearing on the plaintiff, and a notice to attend proceedings on any other person.

9. In all cases it shall be competent for the Judge to direct what persons, or additional persons, shall be served with a summons or notice to attend proceedings, or notice of hearing.

10. Upon the requisition of the charity commissioners, a copy of the judge's note of the evidence taken at the hearing, or such \*part [\*154] thereof as may be required by the commissioners, shall be transmitted by the judge to them, at their office, by post or otherwise.

11. Upon the requisition of the attorney-general, in proceedings instituted by him, a copy of the judge's note of the evidence taken at the hearing, or such part thereof as may be required by the attorney-general, shall be transmitted to him by post or otherwise.

12. A copy of the summons, notice to attend proceedings, notice to appear, together with a copy of the order made by the court, shall in all cases be transmitted by the clerk forthwith, after the hearing, by post or otherwise, as the judge shall direct, to the office of the commissioners.

13. Where the annual income of the charity exceeds £10, the court fees shall be payable as in cases within the ordinary jurisdiction of the court, without prejudice to the privilege of the attorney-general as to costs, and the charitable funds may be made liable to the payment thereof, at the discretion of the Judge.

14. Where the annual income of the charity does not exceed the sum of £10, no fees of court shall be payable out of the funds of the charity; nor shall any fees be paid by any party to the proceeding, unless the Judge shall, in his discretion, order any of the parties to the proceeding before him to pay such fees of court as he shall think fit, without prejudice to the privilege of the Attorney-General as to costs.

15. Where court fees are payable, they shall be calculated according

to the scale of fees applicable to proceedings, for the recovery of tenements under the 9 & 10 Vic., c. 95, s. 122; the annual income of the charity, like the annual rent of the tenement, being treated as the basis of calculation.

16. The order or certificate of the commissioners, or statement of the attorney-general, as to the amount of the annual income, shall be conclusive on the court.

17. The enactments, secretary of state's orders, practice, and forms in force and used in the county courts, shall, subject to the foregoing orders, be adopted with reference to proceedings \*in matters of charitable trusts, so far as the same are applicable, *mutatis mutandis*. [\*155]

18. The above orders shall be in force until further orders shall be made under the Charitable Trust Act, 1853, for regulating proceedings in the county courts relating to charitable trusts.

## APPENDIX.

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### THE SUCCESSION DUTY ACT, 1853.

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#### INTERPRETATION OF TERMS IN THE CONSTRUCTION AND FOR THE PURPOSES OF THIS ACT.

THE term "*real property*" shall include all freehold, copyhold, customary leasehold, and other hereditaments and heritable property, whether corporeal or incorporeal in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments.

The term "*personal property*" shall not include leaseholds, but shall include money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of *real property*.

The term "*property*" alone shall include real property and personal property.

The term "*succession*" shall denote any property chargeable with duty under this act.

The term "*trustee*" shall include an executor or administrator, and any person having or taking on himself the administration of property affected by any express or implied trust.

The term "*person*" shall include a body corporate company and society.

The term "*legacy duty acts*" shall denote the acts now in force for charging duties on legacies, and shares of the personal estates of deceased persons.

[\*158]

\*WHAT SHALL CONFER SUCCESSIONS.

2. Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by

way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, to any other person, in possession or expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition or devolution, a "*succession*," and the term "*successor*" shall denote the person so entitled, and the term "*predecessor*" shall denote the settlor, disponor, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.(a)

#### JOINT TENANTS TAKING BY SURVIVORSHIP CHARGEABLY WITH DUTY.

3. Where any persons shall, at or after the time appointed for the commencement of this act, have any property vested in them jointly, by any title not conferring on them a succession, any beneficial interest in such property accruing to any of them by survivorship shall be deemed to be a succession; and every person to whom any such interest shall accrue shall be deemed to be the successor; and the person upon whose death such accruer shall take place shall be deemed to be the predecessor; and where any persons after the time appointed for the commencement of this act shall take any succession jointly, they shall pay the duty, if any chargeable thereon by this act, in proportion to their respective interests in the succession; and any \*beneficial interest in such [\*159] succession, accruing to any of them by survivorship, shall be deemed to be a new succession, derived *from the predecessor* from whom the joint title shall have been derived.(b)

#### GENERAL POWERS OF APPOINTMENT TO CONFER SUCCESSIONS.

4. Where any person shall have a general power of appointment under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of this act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed, as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon any such death, over property, any person taking any property by the exercise of such power, shall be deemed to take the same as a succession, derived from the person creating the power as predecessor.

(a) It will be perceived by this section, and sections 8 and 10, that any beneficial interest, whether contingent or otherwise, accruing by the death of any person after 18th of May, 1853, whether consisting of a freehold or less estate, or even personalty, will be considered a succession within the meaning of the Act, and chargeable with the same rate of duties as the legacy duties.

(b) The first part of the above section speaks of property already vested at the time of the passing of the Act—and whereon no duty is payable—the latter part makes the succession duty payable by the surviving tenant, on the value of the share accruing by survivorship.

## EXTINCTION OF DETERMINABLE CHARGES TO CONFER SUCCESSIONS.

5. Where any property shall, at or after the time appointed for the commencement of this act, be subject to any charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons, upon the extinction or determination of such charge, estate, or interest, shall be deemed to be a succession accruing to the person or the persons, if more than one, then entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein, or beneficial enjoyment thereof; and the person or [\*160] persons from whom such successor or successors respectively \*shall have derived title to the property so charged, shall be deemed to be the predecessor or predecessors, as the case may be.

## PERSONS NOW BENEFICIALLY ENTITLED TO REAL PROPERTY, SUBJECT TO LEASES FOR LIFE.

6. Provided that no person entitled at the time appointed for the commencement of this act, to the immediate reversion in any real property expectant upon the determination of any lease for life, or for years, determinable on life, shall be chargeable with duty in respect of such determination, in the event of the same occurring in his lifetime.

## DISPOSITIONS ACCOMPANIED BY RESERVATION OF A BENEFIT TO GRANTOR TO CONFER SUCCESSIONS.

7. Where any disposition of property, not being a *bona fide* sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation, or assurance of, or contract for any benefit to the grantor, or any other person for any term of life, or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit, an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made.

## DISPOSITIONS TO TAKE EFFECT AT PERIODS DEPENDING ON DEATH, OR FOR EVADING DUTY.

8. Where any disposition of property shall be made to take effect at a period ascertainable only by reference to the date of the death of any person dying after the time appointed for the commencement of this act, such disposition shall be deemed to confer a succession on the person in whose favour the same shall be made; and where any disposition of [\*161] property shall purport to \*take effect presently, or under such circumstances as not to confer a succession, but by the effect or

in consequence of any engagement, secret trust, or arrangement capable of being enforced in a court of law or equity, the beneficial ownership of such property shall not *bona fide* pass according to such disposition, but shall in fact devolve to any person on death, or at some period ascertainable only by reference to death, then such last-mentioned person shall be deemed to acquire the property so passing as a succession derived from the person making the disposition as the predecessor; and where any court of competent jurisdiction shall declare any disposition to have been fraudulent, and made for the purpose of evading the duty imposed by this act, it shall be lawful for such court to declare a succession to have been conferred on such person at such time and to such an extent as such court shall think just; and such last-mentioned person shall be deemed to have taken a succession accordingly, derived from the person making such disposition as predecessor.(c)

#### MANAGEMENT OF DUTIES.

9. The duties herein-after imposed shall be considered as stamp duties, and shall be under the care and management of the commissioners of inland revenue, herein-after called "the commissioners;" who, by themselves and their officers, shall have the same powers and authorities for the collection, recovery, and management thereof, as are by an act passed in the session holden in the twelfth and thirteenth years of the reign of her present majesty, chapter 1, or by any other act or acts, vested in them for the collection, recovery, and management of any stamp duties; and shall provide proper stamps for denoting the rate *per centum* of the duties payable under this act; and shall \*have all other powers and authorities requisite for carrying this act into execution. [\*162]

#### DUTIES ON SUCCESSIONS.

10. There shall be levied and paid to her majesty, in respect of every such succession as aforesaid, according to the value thereof, the following duties (that is to say)—

Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of one pound *per centum* upon such value.

Where the successor shall be a brother or sister, or a descendant of a brother or sister of the predecessor, a duty at the rate of three pounds *per centum* upon such value.

Where the successor shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the

(c) Many questions, it is presumed, will arise, upon this and the preceding section, where there has been a disposition of real estate by a father, in his lifetime, to and as a provision for a son, by deed of gift, to take effect immediately, but there is, in reality, a secret understanding. Notwithstanding the words in the above section, "capable of being enforced in a Court of Law," &c. Upon a subsequent disposition by the son, a purchaser should inquire whether any secret understanding had existed, in consequence of which a succession duty could have become payable.

predecessor, a duty at the rate of five pounds *per centum* upon such value.

Where the successor shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the predecessor, a duty at the rate of six pounds *per centum* upon such value.

Where the successor shall be in any other degree of collateral consanguinity to the predecessor than is herein-before described, or shall be a stranger in blood to him, a duty at the rate of ten pounds *per centum* upon such value.(d)

[\*163] \*MARRIED PERSONS CHARGEABLE WITH SUCCESSION DUTY.

11. Where any person chargeable with duty under this act in respect of any succession, or chargeable with duty under the legacy duty acts, in respect of any legacy bequeathed to him or her by a testator, dying after the time appointed for the commencement of this act, or in respect of the personal estate of any person dying after the same period, shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, testator, or deceased person, then the person taking such succession, legacy, or personal estate, shall pay in respect thereof the same rate of duty only as such his or her wife or husband would have been chargeable with if she or he had taken the same.(e)

DUTIES PAYABLE WHEN SUCCESSOR IS PREDECESSOR.

12. Where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his

(d) The 55 Geo. III., c. 184, fixes the scale of duties payable according to the relationship of the individual, whereby it will be seen the duties under this Act are assimilated.

Duties under 55 Geo. III., c. 184. Where any legacy is given or devolves to  
 A child of the deceased, or any descendant of a child of the deceased,  
 or for the benefit of the father or mother, or any lineal ancestor of  
 the deceased, . . . . . 1 per cent.  
 To a brother or sister of the deceased, or any descendant of a brother  
 or sister of the deceased, . . . . . 3 per cent.  
 To a brother or sister of the father or mother of the deceased, or any  
 descendant of a brother or sister of the father or mother of the  
 deceased, . . . . . 5 per cent.  
 To a brother or sister of a grandfather or grandmother of the de-  
 ceased, or any descendant of a brother or sister of a grandfather  
 or grandmother of the deceased, . . . . . 6 per cent.  
 And if the person be in any other degree of collateral consanguinity  
 to the deceased, or a stranger in blood, . . . . . 10 per cent.

(e) When, therefore, a succession devolves to a husband or a wife, under this section, the duty must be calculated according to the rate payable by the one who stands the nearest related.

succession at the same rate as he would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself, and no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person, dying after the time appointed for the commencement of this act.

\*PROVISION AS TO JOINT PREDECESSORS.

[\*164]

13. Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the commissioners to agree with the successor as to the duty payable; but if no such agreement shall be made, the successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly.

DUTY ON TRANSMITTED SUCCESSIONS.

14. Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession, but such duty shall be at the highest rate which, if every successor had been subject to duty, would have been payable by any one of them.

DUTIES PAYABLE IN RESPECT OF TRANSFERRED INTERESTS.

15. Where, at the time appointed for the commencement of this act, any reversionary property, expectant on death, shall be vested by alienation, or other derivative title, in any person other than the person who shall have been originally entitled thereto, under any such disposition or devolution as is mentioned in the second section of this act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof, as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with, if no such alienation had been made, or derivative title created; and where, after the time appointed for the commencement of this act, any succession shall, before the successor shall have become entitled thereto, or to the income thereof in possession, \*have become vested by alienation, or by any title not conferring a new succe- sion in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made, or derivative title created; and where the title to any succession shall be accelerated by the surrender or

[\*165]

extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place.(f)

#### SUCCESSION SUBJECT TO TRUSTS FOR CHARITABLE OR PUBLIC PURPOSES.

16. Where property shall become subject to a trust for any charitable or public purposes, under any past or future disposition, which, if made in favour of an individual, would confer on him a succession, there shall be payable in respect of such property, upon its becoming subject to such trusts, a duty at the rate of £10 per cent. upon the amount or principal value of such property, and it shall be lawful for the trustees of any such property to raise the amount of any duty due in respect [\*166] thereof, with \*all reasonable expenses, upon the security of the charity property at interest, with power for him to give effectual discharges for the money so raised.

#### PROVISION FOR LIFE POLICIES AND POST OBIT BONDS.

17. No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bona fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the moneys payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this act, shall be deemed to confer a succession.

(f) The first case decided under this section was *Bayley v. Tindal*, W. R. 129, 1854—where it appeared B. was entitled to the sum of £3,500 (a portion of a fund in court) for his life, and wished to surrender it to his son (for his advancement in life), who was entitled to it after B.'s decease. Such transfer being subject to succession duty, a petition was presented, praying that 1 per cent. out of the aggregate amount might be set apart for succession duty, which *would have been* payable by B.

'The above section was applicable to the present case, and the 53d section gives the court power to secure to the commissioners the duty which would be payable when the son's interest fell into possession'—(per G. L. Russell, in support of the petition.) The court observed, that the only difficulty which arose, was from the fact of this being in respect of a sum of stock—had it been money there would have been no doubt about it, for the sum required by the act in this case, £1 per cent., being the case of a child, would have been at once set apart to answer the demand of the commissioners of inland revenue, whenever it might be made, but it was quite impossible to predicate the fluctuation which might take place in this species of property, between this time and the time when the duty would become payable. You might even suppose a most extraordinary state of things possible, when double the sum would not produce the £1 per cent. in money—it was the duty of the court, under the act, not only to secure to the commissioners the sum that *might be*, but the sum that would be eventually payable.

## EXEMPTIONS

18. Where the whole succession or successions derived from the same predecessor, and passing upon any death to any person or persons, shall not amount in money or principal value to the sum of one hundred pounds, no duty shall be payable under this act in respect thereof, or of any portion thereof; and no duty shall be payable under this act upon any succession, which, as estimated according to the provisions of this act, shall be of less value than twenty pounds in the whole, or upon any moneys applied to the payment of the duty on any succession according to any trust for that purpose, or by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the legacy duty acts; and no person shall be charged with duty under this act in respect of any interest surrendered by him, or extinguished before the time appointed for the commencement of this act; and no person \*charged with the duties on legacies and shares of personal estate under the legacy duty acts, in respect of any pro- [\*167] perty subject to such duties, shall be charged also with the duty granted by this act in respect of the same acquisition of the same property.(g)

## LEASEHOLD ESTATES, HOW TO BE CHARGED.

19. No legatee or other person shall, after the time appointed for the commencement of this act, be chargeable, under the legacy duty acts, with duty not then already due in respect of any leasehold hereditaments of any testator or deceased person, as belonging to the personal estate of the testator or deceased.(h)

## DUTIES PAID ON BEING ENTITLED IN POSSESSION AND ON DETERMINATION OF OUTSTANDING INTEREST.

20. The duty imposed by this act shall be paid at the time when the successor, or any person in his right, or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof, except that if there shall be any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to

(g) The exemptions may be thus stated:—*First*—where the property devolving from the same predecessor does not amount to £100. *Second*—successions under £20. *Third*—successions devolving to a husband or wife of the successor. *Fourth*—successions devolving to the royal family. *Fifth*—certain *specific* legacies (under 39 Geo. III., c. 73,) devolving to bodies corporate or other societies or public bodies. *Sixth*—successions devolving, to be applied for the purposes set forth in the schedule of the 56 Geo. III., c. 56, so far as the same relates to legacies given for the education of poor children in Ireland, or to be applied in support of charitable institutions there, or for any purpose merely charitable. *Seventh*—legacies and shares of personal estate, subject to legacy duty under the Legacy Duty Acts.

(h) By sect. 1, leasehold are included in the term “real property,” for the purposes of this act.

the full enjoyment or value thereof, the duty in respect of the increase value accruing upon the determination of such charge, estate, or interest, shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination; and except that in case of an annuity, [\*168] or property hereby made chargeable as an annuity, the \*duties shall be paid by such instalments as are hereinafter directed or referred to, provided that no duty shall be payable upon the determination of any lease, purporting at the date thereof, to be a lease at rack rent, in respect of the increase accruing to the successor upon such determination.(i)

#### HOW INTEREST OF A SUCCESSOR IN REAL PROPERTY IS CONSIDERED.

21. The interest of every successor, except as herein provided in real property, shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this act, shall be valued accordingly to the tables of the schedule annexed to this act, and the duty chargeable thereon shall be paid by eight equal half-yearly instalments: the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the seven following instalments at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due; provided that if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable, except in the case of a successor, who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments [\*169] unpaid at his death shall be a continuing charge on \*such interest, in exoneration of his other property, and shall be payable by the owner for the time being of such interest.(k)

#### RULES FOR VALUING LAND, HOUSES, ETC.

22. In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges, and other property,

(i) The duty is thus only payable, first, when a party becomes entitled in possession, and secondly, in case of any increase accruing on determination of any charge, if not previously paid or commuted for; and to facilitate the payment of duty on annuities, it may be paid by instalments, &c.

(k) From the above it would appear that the interest of every successor, in "real property," must be considered to be the value of an annuity equal to the annual value of such property during the residue of his life, or for any less period during which he shall be entitled—and duty payable by eight periodical instalments, commencing at the end of twelve months from the successor becoming entitled to the beneficial enjoyment of the real property.

yielding or capable of yielding income not of a fluctuating character, an allowance shall be made of all necessary outgoings.

#### RULE AS TO TIMBER.

23. Where timber, trees, or wood, not being coppice of underwood, shall be comprised in any succession, the successor shall be chargeable with duty upon his interest in the net moneys, after deducting all necessary outgoings for the year, which shall from time to time be received *from any sales of such timber*, trees, or wood, and shall account for and pay the same yearly; provided that no duty shall be payable on the net moneys received from the sale of timber, trees, or wood, in any one year, unless such net moneys shall exceed the sum of ten pounds; provided, that if the successor shall be desirous of commuting the duty, and shall deliver to the commissioners an estimate of the net moneys obtainable by him from the sale of such timber, trees, and wood, as may, in a prudent course of management of the property, be felled by such successor during his life, the commissioners, if satisfied with such estimate, shall accept the same and assess the duty accordingly.<sup>(l)</sup>

#### \*RULE AS TO ADVOWSONS.

[\*170]

24. A successor shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless the same, or some right of presentation, or some other interest in or out of such advowson or church patronage, shall be disposed of by or in concert with him for money or money's worth, in which case he shall be chargeable with duty upon the amount or value of the money or money's worth for which the same, or any such presentation or interest, shall be so disposed of at the time of such disposal.

#### RULE AS TO PROPERTY SUBJECT TO BENEFICIAL LEASES.

25. Where a successor entitled to any real property, subject to any lease, by reason whereof he shall not be presently entitled to the full enjoyment thereof, shall not have paid duty in respect of the full yearly value of such property, he shall be chargeable with duty upon his interest, in any fine, or grassum, or other consideration which may be received during his life, for the renewal of any such lease, or the grant of any reversionary lease of the same property.

(l) Questions will probably arise upon this section, as to what duty should be paid, where the person on whom the timber devolves converts it into goods before disposing of it, and in all analogous cases.

If the section only applies to timber felled for *immediate* sale, the duty should, it is apprehended, be assessed and paid at once, otherwise a duty on its improved value might be payable, and it will generally be advisable to commute for the duty in the first instance.

## RULE AS TO MANORS AND MINES, ETC.

26. The yearly value of any manor, opened mine, or other real property, of a fluctuating yearly income, shall either be calculated upon the average profits or income derived therefrom, after deducting all necessary outgoings during such a number of preceding years as shall be agreed upon for this purpose, between the commissioners and the successor, before the first payment of duty on the succession shall have become due; or if no such period shall be agreed upon, then the principal value of such property shall be ascertained, and the annual value thereof shall be considered to be equal to interest calculated at the rate of three pounds per centum per annum on the amount of such principal value.

## [\*171] \*DUTY PAYABLE BY CORPORATIONS TAKING REAL ESTATE.

27. Where any body corporate company or society shall become entitled, as successors, to any real property, the duty in respect thereof shall be assessed upon the principal value of such property, but shall be payable by such instalments, at such times, and in such manner as the same would be payable if assessed in respect of property devolving on a successor in fee simple; and it shall be lawful for such body corporate company or society, or any trustee thereof, to raise the amount of any duty due in respect of their succession upon the security thereof, at interest, with power for them to give effectual discharges for the money so raised.

## ALLOWANCE FOR FINES PAID BY SUCCESSOR.

28. If a successor, or any person on his behalf, upon becoming entitled to any copyhold or other real property, shall be subject to any fines, casualties of superiority compositions, reliefs, or charges, incident to the tenure thereof, and due in respect of his succession, he shall be entitled to have a deduction allowed to him of the amount of such fines, casualties, compositions, reliefs, or charges, from the assessable value of his interest in such copyhold or other real property.

## REAL PROPERTY DIRECTED TO BE SOLD, TO BE CHARGED AS PERSONALTY.

29. The interest of any successor in moneys to arise from the sale of real property, under any trust for the sale thereof, so far as the same shall not be chargeable with duty under the legacy duty acts, shall be deemed to be personal property, chargeable with duty under this act—provided, that where such moneys shall be subject to any trust, for the re-investment thereof in the purchase of other real property, to which the successor would not be absolutely entitled, such moneys shall be deemed to be real property, and for the purpose of this act, each successor's interest

[\*172] \*therein shall be considered to be of the value of an annuity payable during his life, or for any less period during which he shall be entitled

equal in amount to the annual produce of the actual trust property, at the time of his becoming entitled in possession, whether the same shall then be the real property, subject to the trust or direction for sale, or any property purchased in substitution for it, or any immediate investment of the produce of the sale of the original property.

PERSONAL PROPERTY TO BE INVESTED IN REAL PROPERTY HOW CHARGED.

30. The interest of any successor in personal property, subject to any trust for the investment thereof in the purchase of real property, to which the successor would be absolutely entitled, shall, so far as the same shall not be chargeable with duty under the legacy duty acts, be chargeable with duty under this act as personal property; and personal property subject to any trust for the investment thereof in the purchase of real property, to which the successor would not be absolutely entitled, shall so far as the same shall not be chargeable with duty under the legacy duty acts, be chargeable with duty under this act as real property; and for the purposes of this act each successor's interest therein shall be considered to be of the value of an annuity; payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall be the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase.

ANNUITIES TO BE VALUED ACCORDING TO TABLES.

31. Where it shall be required to calculate, for the purposes either of this act or of the legacy duty acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement \*of this act, be calculated according to the tables in the schedule annexed to this act, and [\*173] not according to the tables in the schedule annexed to the act of the thirty-sixth year of the reign of King *George* the Third, chapter fifty-two, and such annuity or interest shall be chargeable with duty accordingly.<sup>(m)</sup>

PROVISION AS TO ASSESSMENT OF PERSONALTY.

32. The following provisions relating to the assessment and payment of duty on personal estate, and the exemption thereof from duty in certain cases, namely, the eighth, tenth, eleventh, twelfth, fourteenth, and twenty-third sections of the said act of the thirty-sixth year of the reign of King *George* the Third, chapter fifty-two, shall be applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such personal property were a legacy

<sup>(m)</sup> This is, in effect, a cancellation of the tables in the Legacy Duty Act, 30 Geo. III., c. 52.

bequeathed by the predecessor to the successor, and were subject to the said provisions, and as if the tables in the said act referred to were the tables in the schedules annexed to this act.(n)

#### ALLOWANCE TO DONEE OF GENERAL POWER OF APPOINTMENT.

33. Where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property.

#### WHAT ALLOWANCE TO BE MADE FOR INCUMBRANCES.

34. In estimating the value of a succession, no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys which the successor may, previously to his possession, \*have laid out in the substantial repairs or permanent [\*174] improvement of real property comprised in his succession; provided that, upon any successor becoming entitled to real property, subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge, as reducing the annual value *pro tanto* of such real property.

#### CONTINGENT INCUMBRANCES.

35. In estimating the value of a succession, no allowance shall be made in respect of any contingent incumbrance thereon, but in the event of such incumbrance taking effect as an actual burthen on the interest of the successor, he shall be entitled to a return of a proportionate amount of the duty so paid by him, in respect of the amount or value of the incumbrance, when taking effect.

#### DUTY TO BE CALCULATED WITH REGARD TO CONTINGENCIES.

36. In estimating the value of a succession, no allowance shall be made in respect of any contingency, upon the happening of which the property may pass to some other person; but in the event of the same so passing, the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest.

#### PROVISION FOR RETURN OF DUTY.

37. Where a successor shall not have obtained the whole of his succession at the time of the duty becoming payable, he shall be chargeable

(n) See Post as to the sections above referred to.

only with duty on the value of the property, or benefit from time to time obtained by him; and whenever any duty shall have been paid on account of any succession, and it shall afterwards be proved, to the satisfaction of the commissioners, that such duty not being due from the person paying the \*same, was paid by mistake, or was paid in respect of property which the successor shall have been unable [\*175] to recover, or from or of which he shall have been evicted or deprived by any superior title, or that for any other reason it ought to be refunded, the commissioners shall thereupon refund the same to the person entitled thereto.(o)

#### ALLOWANCE TO BE MADE TO SUCCESSOR IN RESPECT OF RELINQUISHED PROPERTY.

38. Where any successor, upon taking a succession, shall be bound to relinquish, or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property.

#### POWER FOR COMMISSIONERS TO COMPOUND DUTIES.

39. Where, in the opinion of the commissioners, any succession shall be of such a nature, or so disposed or circumstanced, that the value thereof shall not be fairly ascertainable under any of the preceding directions, or where, from the complication of circumstances affecting the value of a succession, or affecting the assessment or recovery of the duty thereon, the commissioners shall think it expedient to exercise this present authority, it shall be lawful for them to compound the duty payable on the succession, \*upon such terms as they shall think fit, and to give [\*176] discharges to the successor, upon payment of duty according to such composition; and it shall be lawful for them, in any special cases in which they may think it expedient so to do, to enlarge the time for payment of any duty.

#### POWER OF COMMISSIONERS TO RECEIVE DUTY IN ADVANCE.

40. It shall be lawful for the commissioners to receive any duty ten-

(o) The latter part of this section is assimilated to the 34th section of the 38 Geo. III., c. 52, which enacts, that if at any time after payment of duty on any legacy, or residue of the personal estate of any person deceased, any *debt* shall be recovered against the estate of such deceased person, or any loss shall happen by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal estate, hath been received or retained, shall be obliged to refund the same, or any part thereof, then, in every such case, it shall be lawful for the said Commissioners of Stamp Duties, and they are hereby required, on due proof, made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this Act imposed, or to allow the same in future payments, as the case may permit or require.

dered to them in advance, and to allow discount thereon at the rate of four pounds *per centum per annum*, or at such other rate as may from time to time be directed by the commissioners of her majesty's treasury; and no person, by reason of his having made any payment of duty in advance, shall be prejudiced in his right to have any re-payment of duty made to him to which he may become entitled under any of the provisions of this act.

#### POWER FOR COMMISSIONERS TO COMMUTE FUTURE DUTIES.

41. It shall be lawful for the commissioners, in their discretion, upon application made by any person who shall be entitled to a succession in expectancy, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid, and for assessing the amount which shall be so payable they shall cause a present value to be set upon such presumptive duty, regard being had to the contingencies affecting the liability to such duty, and the interest of money involved in such calculation being reckoned at the rate for the time being allowed by the commissioners in respect of duties paid in advance; and upon the receipt of such certain sum, they shall give discharges to the successor accordingly.<sup>(p)</sup>

#### [\*177] \*DUTY TO BE A FIRST CHARGE ON PROPERTY.

42. The duty imposed by this act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed; and such duty shall also be a first charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian or committee, or tutor or curator, or of the husband of any wife who shall be the successor; and the said duty shall be a debt due to the crown from the successor, having, in the case of real property comprised in any succession, priority over all charges and interests created by him, but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession; provided, that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the

(p) Under this section, any person entitled to a succession in expectancy, with the sanction of the commissioners, may have the presumptive duties commuted for a definite sum—to enable them to do which, a present value must be set upon such presumptive duty, regard being had to the contingencies affecting the liability to such duty.

succession; and in the meantime, upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys.(q)

\*PROVISION FOR THE SEPARATE ASSESSMENT OF PROPERTIES. [\*178]

43. The commissioners shall, at the request of any successor, or any person claiming in his right, except, or cause to be made, so many separate assessments of the duty payable in respect of the interest of the successor in any separate properties, or in defined portions of the same property, as shall be reasonably required, and in such cases the respective properties shall be chargeable only with the amount of duty separately assessed in respect thereof; and it shall be lawful, also, for the commissioners, by their certificates, to be issued in such form as they shall think fit, from time to time to declare, that any duties, already assessed, whether collectively or distributively, in respect of any succession, shall thenceforth be charged, as to any unpaid instalments, according to any further distribution thereof upon separate parts only of the property in respect of which such assessment shall have been made, in which case the charge of such duties shall be thenceforth limited according to such further distribution.

WHAT PERSONS ARE ACCOUNTABLE FOR DUTY.

44. The following persons, beside the successor, shall be personally accountable to her majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively, after the time appointed for the commencement of this act; that is to say, every trustee, guardian, committee, tutor or curator, or husband, in whom respectively any property, or the management of any property, subject to such duty, shall be vested, and every person in whom the same shall be vested by alienation or other derivative title, at the time of the succession becoming an interest in possession; and all such trustees, guardians, committees, tutors, curators, husbands, and persons shall be authorized to compound, or pay in advance, or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount and the expenses incident thereto at \*interest on the security of such property, with power to give effectual discharges for the [\*179]

(q) This is one of the most important sections in the act, whereby the duty is expressly made a lien, and virtually, an incumbrance on the estate of the successor. The certificates of the duty having been paid, will, therefore, in all cases, be necessary for the perfecting of titles to real estates, where they are deduced from, or through, or are affected by the death of any person since the 19th of May, 1853. It is, moreover, made a crown debt—but unlike other crown debts, is not to affect any other real property of the successor—but only the property comprised in the succession.

In those cases where the purchase is of an estate expectant upon the death of another, the purchaser must remember the estate will be liable for the duty when it would have fallen into possession.

same, and such security shall have priority over any charge or incumbrance created by the successor; and in the event of the non-payment of such duty as aforesaid, every person hereby made accountable shall be a debtor to her majesty in the amount of the unpaid duty for which he shall be so accountable.(r)

NOTICE OF SUCCESSION TO BE GIVEN TO COMMISSIONERS, AND A  
RETURN OF THE PROPERTY MADE.

45. The persons hereby made accountable for the payment of duty in respect of any succession, or some of them, shall, in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of the same, or any part thereof, to or for the successor or any person in his right, and in the case of real property when any duty in respect thereof shall first become payable, give notice to the commissioners or to their officers of their liability to such duty, and shall at the same time deliver to the commissioners or to their officers a full and true account of the property for the duty whereon they shall respectively be accountable, and of the value thereof, and of the deductions claimed by them, together with the names of the successor and predecessor, and their relation to each other, and all such other particulars as shall be necessary or proper for enabling the commissioners fully and correctly to ascertain the duties due; and the commissioners, if satisfied with such account and estimate as originally delivered, or with any amendments that may be made therein upon their requisition, may assess the succession duty on the footing of such account and estimate; but it shall be lawful for the commissioners, if dissatisfied with such account and estimate, to cause an account and estimate [\*180] to be taken by any person or persons to be appointed by themselves for that purpose, and to assess the duty on the footing of such last mentioned account and estimate, subject to appeal, as hereinafter provided; and if the duty so assessed shall exceed the duty assessable according to the return made to the commissioners, and with which they shall have been dissatisfied, and if there shall be no appeal against such assessment, then it shall be in the discretion of the commissioners, having regard to the merits of each case, to charge the whole or any part of the expenses incident to the taking of such last-mentioned account and estimate, on the interest of the successor in respect whereof the duty shall be due, in increase of such duty, and to recover the same forthwith accordingly; and if there shall be an appeal against such last-mentioned assessment, then the payment of such expenses shall be in the discretion of the court of appeal herein-after appointed.

(r) This section should be read in conjunction with the 42d section, which makes personal property subject to *the like charge or lien* for the duty, as real estate—but this section extends the liability to trustees and others specifically mentioned, not only where property but the *management* of any property is vested in them, and empowers them to charge the estate with an amount sufficient for payment of duty and expenses.

## PENALTY ON NOT GIVING NOTICE OF SUCCESSION.

46. If any person required to give any such notice, or deliver such account as aforesaid, shall wilfully neglect to do so at the prescribed period, he shall be liable to pay to her majesty a sum equal to ten pounds *per centum* upon the amount of duty payable by him, or in the case of a succession chargeable with a higher rate of duty than one pound *per centum* upon the value thereof, upon such less sum as such duty, if assessable at the rate of one pound *per centum* upon the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue; and if any person liable under this act to pay any duty, shall, after such duty shall have been finally ascertained, wilfully neglect to do so within twenty-one days, he shall also be liable to pay to her majesty a sum equal to ten pounds *per centum* upon the amount of duty so unpaid, or upon such less sum as such duty, if assessable at the rate of one pound *per centum* on the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue.

## \*PROCEEDING, IF RETURN NOT MADE.

[\*181]

47. If any accountable party, required by the commissioners to deliver any such account as aforesaid, shall make default in doing so, it shall be lawful for the commissioners to sue out of Her Majesty's Court of Exchequer, in England, Scotland, or Ireland, as they shall think expedient, according to the circumstances of the case, and for such court to issue a writ of summons, in such form as the judges of such court shall from time to time frame, commanding the party so in default to deliver such account within such period as may be appointed in the writ, or to show cause to the contrary; and on cause being shown, such order shall be made as shall be just.

## POWER TO ENFORCE RETURNS FROM EXECUTORS AND ADMINISTRATORS.

48. The commissioners shall, for the purposes of the legacy duty acts, be empowered to require and enforce the delivery of accounts from executors, administrators, and trustees of property, and legatees chargeable with duty under such acts, and for the duty whereon they shall be accountable, in the same manner as they are, by the last preceding section of this act, empowered to require and enforce the delivery of accounts for the purposes of this act.

## ACCOUNTING PARTY TO VERIFY ACCOUNT BY PRODUCTION OF BOOKS, ETC.

49. Every person who, under the provisions of this act, may deliver any account or estimate of the property comprised in any succession, shall, if required by the commissioners, produce before them such books and

documents in the custody or control of such person, so far as the same relate to such account or estimate, as may be capable of affording any necessary information for the purpose of ascertaining such property, and the duty payable thereon; and the commissioners may, without payment [\*182] of \*any fee, inspect and take copies of any public book, but all such information shall be deemed to be confidential, and the commissioners shall not disclose the same, or the contents of any document or book, to any person, otherwise than for the purpose of this act.

#### POWER FOR ACCOUNTABLE PARTY TO APPEAL.

50. It shall be lawful for any accountable party, dissatisfied with the assessment of the commissioners, upon giving, within twenty-one days after the date of such assessment, notice in writing, to the commissioners, of his intention to appeal against such assessment, and a statement of the grounds of such appeal, such statement to be furnished within the further period of thirty days, to appeal by petition, according to Her Majesty's Court of Exchequer, in England, Scotland, or Ireland, according to the place in which the appellant shall be resident; and every such court, or any judge thereof, sitting in chambers, shall have jurisdiction to hear and determine the matter of such appeal, and the costs thereof, with power to direct, for the purposes of such appeal, any inquiry, valuation, or report to be made by any officer of the court, or other person, as such court or judge may think fit; provided, that where the sum in dispute in respect of duty on such assessment does not exceed fifty pounds, the accountable party may, having given notice of appeal and delivered a statement of the grounds thereof, as herein-before directed, appeal to the judge of the county court in *England*, the Sheriff Court in *Scotland*, or the Assistant Barrister's Court in *Ireland*, for the district, county, or division in which the appellant shall be resident, or the property be situate; and every such judge shall have jurisdiction to hear and determine the matter of such last-mentioned appeal, with the like power and authority as are by this section given to a judge of Her Majesty's Court of Exchequer.

[\*183] \*DUTY TO BE ENTERED BY THE COMMISSIONERS IN A BOOK, AND A STAMPED RECEIPT TO BE GIVEN.

51. Whenever any payment of duty shall be made under this act, the same shall be entered in a book to be kept by the commissioners for this purpose, and the receiver general of island revenue, or other proper officer appointed by the commissioners, shall give a receipt for the same in such form as they shall think fit, and stamped with the proper stamp for denoting the rate of duty, and the commissioners shall from time to time deliver to any person interested in any property affected by such duty, on applying for the same for any reasonable purpose approved by the commissioners, a certificate, in such form as they may think fit, of such payment.(s)

(s) See note to section 42, page 179.

## PROTECTION TO BONA FIDE PURCHASERS.

52. Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession or any part thereof, shall exonerate a *bona fide* purchaser for valuable consideration, and without notice, from such duty, notwithstanding any suppression or mis-statement in the account upon the footing whereof the same may have been assessed, or any insufficiency of such assessment; and no *bona fide* purchaser of property for valuable consideration under a title not appearing to confer a succession, shall be subject to any duty with which such property may be chargeable under the provisions of this act, by reason of any extrinsic circumstances of which he shall not have had notice at the time of such purchase.

COURT, IN SUITS FOR THE ADMINISTRATION OF PROPERTY, TO  
PROVIDE FOR PAYMENT OF DUTY.

53. Whenever any suit shall be pending in any court, for the administration of any property chargeable with duty under this act, or the legacy duty acts, such court shall provide, out of \*any property which may be in the possession or control of the court, for the payment [\*184] of duty to the commissioners.

## COMMENCEMENT OF ACT.

54. This act shall be taken to come into operation on the nineteenth day of May, one thousand eight hundred and fifty-three, and shall take effect accordingly.

## TITLE.

55. This act may be cited for all purposes as "The Succession Duty Act, 1853."

[\*185] *\*The following are the Sections of the 36 George III., c. 52, referred to by the 32nd Section of the Succession Duty Act, as being embodied in that Act.(a)*

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HOW VALUE OF THE ANNUITIES AND DUTY ARE TO BE CALCULATED.

8. And be it further enacted, that the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years, or other period of time, shall be calculated, and the duty chargeable thereon shall be charged according to the tables in the schedule hereunto annexed; and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency, provided always, that if any such annuity shall determine, by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall, at any time, determine upon any other contingency than the death of any person or persons, then and in such case not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any [\*186] duties which shall have previously become due to \*apply for and obtain a return of so much of the duty so paid, as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured: which abatement, the said commissioners for management of the stamp duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any moneys in their hands arising from the duties imposed by this act.

(a) See page 173.

DUTIES ON LEGACIES GIVEN TO PURCHASE ANNUITIES, TO BE CALCULATED ON SUMS NECESSARY TO PURCHASE THEM.

10. And be it further enacted, that the duty payable upon any legacy, given by direction to purchase, with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount, for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity, according to the tables before mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied, shall be discharged by payment of such duty, so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy; and the annuity to be purchased, for the benefit of the person or persons entitled to the benefit of such legacy, shall be reduced in proportion to the amount of the duty payable thereon, as aforesaid; such reduction to be calculated in the same manner as the duty so payable is hereinbefore directed to be calculated, and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased.

\*DUTY ON LEGACIES WHOSE VALUE CAN ONLY BE ASCERTAINED BY APPLICATION OF ALLOTTED FUND. [\*187]

11. And be it further enacted, that if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith, or if the amount or value of any benefit, given by any will or testamentary instrument, cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained, then, and in every such case, such duty shall be charged upon the several sums of money or effects which shall be applied, from time to time, for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same.

DUTY ON LEGACIES BY PERSONS IN SUCCESSION.

12. And be it further enacted, that the duty payable on a legacy, or residue, or part of residue of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy, or residue, or part of residue so given, as in the case of a legacy to one

person ; and where any legacy, or residue, or part of residue, shall be given to, or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable [\*188] with the duty in respect of such \*bequest in the same manner as if the annual produce thereof had been given by way of annuity, and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce ; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is herein-before directed to be charged and paid, in like cases of partial interests charged on any property given otherwise than to different persons in succession, and all and every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession.

#### ARTICLES, WHILE ENJOYED IN KIND, NOT LIABLE TO DUTY.

14. Provided always, and be it further enacted, that no duty shall be paid on any articles of plate, furniture, or other things not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money, or other property yielding an income ; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable [\*189] \*and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons, but shall not be a charge on any person or persons by reason of his, or her, or their, having assented to such bequest, as the person or persons having or taking the burden of the execution of the

will or testamentary instrument by which such bequest shall have been made.

DUTY ON LEGACIES NOT SATISFIED IN MONEY, HOW TO BE PAID.

23. And be it further enacted, that where any legacy, or part of any legacy, or residue, or part of residue, whereon any duty shall be chargeable by this act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then, and in such case, the duty shall be charged and paid in respect to such legacy, or part of legacy, or residue, or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same. Provided always, that if any legacy or bequest shall be made in satisfaction of any other legacy or bequest, or title to any residue, or part of residue of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty.



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☞ Should the General Index in any part be found defective, the reader is referred to the Analytical Table of Contents prefixed











